Supreme Court, U.S.
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No. 05-1272

In the Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.,

PETITIONERS,

v.

UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA *EX REL.* JAMES S. STONE,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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U.S. Court of Appeals for the Tenth Circuit

No. 99-1351

8/10/99	[1255290] Civil case docketed. Preliminary record filed. DATE RECEIVED: 8/9/99. Transcript order form due 8/20/99 for Charlotte Hoard in 99-1351, 99-1352, and 99-1353 pursuant to R.42.1. Docketing statement due 8/20/99 for USA ex rel, Stone in 99-1351, for Boeing No. American and Rockwell Internat'l. in 99-1352, and for United States in 99-1353. Notice of appearance due 8/20/99 for Boeing No. American, Rockwell Internat'l. USA ex rel, Stone and USA 99-1351, 99-1352, and 99-1353. (afw) [99-1351 99-1352 99-1353]
* * *	
8/19/99	[1258138] Notice filed that the transcript is already on file in district court. Notice due that record is complete 8/25/99 for Richard P. Matsch. (afw) [99-1351
8/19/99	[1258140] Docketing statement filed by USA ex rel, Stone in 99-1351. Original and 4 copies. c/s: y. (afw) [99-1351]
* * *	
10/27/99	[1275087] Filed notice record is complete 10/27/99. (nak) [99-1351 99-1352 99-1353]
* * *	

2/7/00 [1300144] Brief filed by Rockwell Internat'l., Boeing No. American in 99-1351, 99-1352, 99-1353. Original and 7 copies. c/s: y. Served on 2/7/00. Oral argument? y. Appendix filed (9 volumes). Original and 1 appendix copy. Appendix Pages: 5346. (pdw) [99-1351 99-1352 99-1353]

2/7/00 [1511864] Oversized record filed. Record can be located at Section: I Shelf: 2 (jaz) [99-1351 99-1352 99-1353]

* * *

3/20/00 [1310564] Brief filed by USA ex rel, Stone in 99-1351, 99-1352 and 99-1353. Original and 7 copies. c/s: y. Oral Argument? y (afw) [99-1351 99-1352 99-1353]

* * *

3/20/00 [1310573] Appendix filed by USA ex rel, Stone in 99-1351, 99-1352 and 99-1353. Original and 1 copy. Appendix pages: 145. c/s: y. (afw) [99-1351 99-1352 99-1353]

* * *

3/22/00 [1311730] Appellee's motion to file an oversize brief 11,666 long [99-1351, 99-1352, 99-1353] filed by USA ex rel, Stone and United States. Original and 3 copies. c/s: y (nak) [99-1351 99-1352 99-1353]

3/28/00	[1312528] Order filed by Judges Porfilio, Murphy granting in part United States, ex rel. James Stone's motion to file an oversize brief. The governments' brief may not exceed 7000 words, the brief remains due on or before 4/7/00 [1311730-1] in 99-1351, 99-1352, 99-1353. Parties served by mail. (nak) [99-1351 99-1352 99-1353]
4/13/00	[1317199] Brief filed by United States in 99-1351, 99-1352 and 99-1353. Original and 7 copies. c/s: y. Oral Argument? y. Answer and reply brief due for Rockwell on 5/8/00. (kf) [99-1351 99-1352 99-1353]

* * *

5/10/00	Brief filed by Appellant/Cross-Appellee Rockwell Internat'l. in 99-1351, 99-1352 and in 99-1353. Original and 7 copies. c/s: y. Supplemental Appendix Volume X (Original and 1 copy) filed by Rockwell Internat'l. Reply brief due for Stone on 5/24/00. (kf) [99-1351 99-1352 99-1353]

* * *

9/24/01	[1450136] Terminated on the Merits after Oral Hearing; Judgment Affirmed; Written, Signed, Published. Briscoe, concurring and dissenting on the conclusion that James Stone qualifies as an "original source" under 31 U.S.C. 3730(e)(4)(E); Holloway, authoring judge; Politz. [99-1351, 99-1352, 99-1353] (kf) [99-1351 99-1352 99-1353]
9/27/01	[1451137] Amendment to opinion (correction of site referenced) filed. (gah) [99-1351 99-1352 99-1353]

11/2/01 [1460970] Petition for rehearing en banc [99-1351, 99-1352, 99-1353] filed by Rockwell Internat'l. in 99-1351, 99-1352 and 99-1353. Original and 14 copies. c/s: y (afw) [99-1351 99-1352 99-1353]

* * *

11/23/01 [1465412] Response to Rockwell's petition for rehearing en banc filed by USA ex rel, Stone in 99-1351, 99-1352 and 99-1353 submitted to court. Original and 14 copies. c/s: y. (jal) [99-1351 99-1352 99-1353]

* * *

12/11/01 [1469690] Appellants' motion filed by Appellants Rockwell Internat'l and Boeing No. American in 99-1351, 99-1352, and 99-1353 to strike argument one in Stone's response or in the alternative, for leave to file reply to Stone's response. Original and 4 copies. c/s: y. (gah)

12/11/01 [1469692] Reply to Stone's response received from Rockwell Internat'l and Boeing No. American in 99-1351, 99-1352, and 99-1353 (reply attached to motion), but not filed. Original and 4 copies. c/s: y. (gah) [99-1351 99-1352 99-1353]

* * *

12/17/01 [1471268] Response to motion to strike argument, filed by USA ex rel, Stone in 99-1351, 99-1352, and 99-1353. Original and 14 copies. c/s: y. (gah) [99-1351 99-1352 99-1353]

* * *

3/4/02	[1490712] Order filed by Judges Briscoe, Holloway and Politz granting Petition for rehearing for the limited purpose of modifying the opinion and ordering a limited remand to the district court and denying suggestion of rehearing en banc. [1460970-1] This court retains jurisdiction in 99-1351, 99-1352 and 99-1353. (afw) [99-1351 99-1352 99-1353]
3/4/02	[1490739] Order filed by Judges Briscoe, Holloway and Politz reopening appeal and remanding case for the limited purpose of modifying the opinion and ordering a limited remand to the district court for the purpose of that court making findings of fact and conclusions concerning the issue of disclosure prior to filing of this action in accordance with the False Claims Act, concerning the saltcrete, pondcrete and irrigation matters. Upon completion of those proceedings, a supplemental record will be transmitted to this court. On all other issues except that requiring the additional factual findings and conclusions on saltcrete, pondcrete and irrigation matters, the rulings made previously in our opinion are undisturbed. (See Order on Rehearing) Supplemental record on appeal due 4/30/02 for Richard P. Matsch in 99-1351, 99-1352 and 99-1353. Parties served by mail. (afw) [99-1351 99-1352 99-1353]
12/23/02	[1573918] Supplemental record filed: 3 Volumes—Supp. ROA Pages: 3 volumes. Copy filed in Volumes: y. (jal) [99-1351 99-1352 99-1353]

12/23/02 [1573941] Appellee's motion for order vacating judgment for qui tam plaintiff James S. Stone in accordance with district court's findings and conclusions on limited remand filed by Rockwell Internat'l. in 99-1351, 99-1352 and 99-1353. Original and 3 copies. c/s: y. (jal)

12/26/02 [1574169] Response and motion for extension of time of plaintiff-appellee/cross-appellant James S. Stone to Rockwell's motion for and order vacating judgment for Qui Tam plaintiff 99-1351, 99-1352 and 99-1353. Original and 3 copies. c/s: y. (klp) [99-1351 99-1352 99-1353]

12/26/02 [1574171] Response and motion for extension of time of plaintiff-appellee/cross-appellant James S. Stone to Rockwell's motion for an ordere vacating judgment for Qui Tam Plaintiff Document [1574169-1] in 99-1351, 99-1352 and 99-1353 submitted to court. (klp) [99-1351 99-1352 99-1353]

1/6/03 [1575917] Order filed by Judges Briscoe and Holloway- the panel has decided that they shall proceed as a two-judge panel in view of the death of Judge Politz. Appellees- Cross-Appellants' motion for extension of time to respond to appellants-cross-appellees' motion for order vacating judgment is granted. Response to motion due 1/29/03 for USA ex rel, Stone and United States in 99-1351, 99-1352, and 99-1353. Parties served by mail. (gah) [99-1351 99-1352 99-1353]

* * *

1/24/03 [1582687] Supplement to Preliminary record on appeal transmitted on 8/9/99 and 8/12/99 filed. (afw) [99-1351 99-1352 99-1353]

1/29/03 [1583009] Appellee/cross-appellant James S. Stone's (1) response to Rockwell's motion dated 12/23/02 for an order vacating judgment for Qui Tam plaintiff and (2) motion for a ruling affirming the judgment in its entirety filed by USA ex rel, Stone in 99-1351, 99-1352 and 99-1353. Original and 3 copies. c/s: y. (klp) [99-1351 99-1352 99-1353]

* * *

2/18/03 [1588370] Reply brief in support of motion for order vacating judgment filed by Rockwell Internat'l. in 99-1351, 99-1352, and 99-1353. Original and 3 copies. c/s: y. (gah) [99-1351 99-1352 99-1353]

* * *

3/7/03 [1593825] Reply in support of cross-motion for ruling affirming judgment in its entirety filed by USA ex rel, Stone and United States in 99-1351, 99-1352 and 99-1353. Original and 3 copies. c/s: y. (gah) [99-1351 99-1352 99-1353]

* * *

3/5/04 [1691281] Terminated on the Merits after Submission Without Oral Hearing; Affirmed; Written, Signed, Unpublished. Briscoe, dissenting; Holloway, authoring judge; Hartz. [99-1351, 99-1352, 99-1353]. Parties served by mail on 3/5/04. (na) [99-1351 99-1352 99-1353]

* * *

4/16/04 [1701567] Petition for rehearing in banc filed by Rockwell Internat'l.and Boeing No. American in 99-1351, 99-1352 and 99-1353. Original and 18 copies. c/s: y. (gah) [99-1351 99-1352 99-1353]

* * *

4/22/04 [1702976] Appellee's motion for attorney fees [99-1351, 99-1352, 99-1353, 03-1093] filed by USA ex rel, Stone. Original and 3 copies. c/s: y (na) [03-1093 99-1351 99-1352 99-1353]

4/22/04 [1702981] Declaration of Hartley David Alley regarding fees filed by USA ex rel, Stone in 99-1351, 99-1352, 99-1353, and 03-1093. Original and 3 copies. c/s: y (na) [03-1093 99-1351 99-1352 99-1353]

4/22/04 [1702983] Affidavit of Maria T. Vullo in support of motion for attorney fees and expenses filed by USA ex rel, Stone 99-1351, 99-1352, 99-1353, 03-1093. Original and 3 copies. c/s: y (na) [03-1093 99-1351 99-1352 99-1353]

* * *

5/6/04 [1706680] Response filed by USA ex rel, Stone in 99-1351, 99-1352, and 99-1353 to Rockwell's petition for rehearing and submitted to court. Original and 18 copies. c/s: y. (gah) [99-1351 99-1352 99-1353]

* * *

1/4/06 [1875325] Order filed by Judges Briscoe, Holloway & Hartz denying rehearing and rehearing en banc [1701567-1] in 99-1351, 99-1352, 99-1353. (sts) [99-1351 99-1352 99-1353]

* * *

4/5/06	[1904818] Order filed by Judges Briscoe, dissenting, Holloway and Hartz granting Appellee Stone's motion for attorney fees [1702976-1] and remanding to district court for a determination of a reasonable fee award in 99-1351, 99-1352 and 99-1353. Parties served by mail. (afw) [99-1351 99-1352 99-1353]
4/10/06	[1906863] Petition for writ of certiorari filed on April 4, 2006. Supreme Court Number 05-1272. (sts) [99-1351 99-1352 99-1353]
10/11/06	[1964030] Supreme Court order dated 9/26/06 granting certiorari limited to question 1 presented by the petition filed. (sts) [99-1351 99-1352 99-1353]
10/19/06	[1966565] Certiorari record transmitted to Supreme Court. Index follows: Volume 1 - 10th Cir. dockets for nos. 99-1351, 99-1352 & 99-1353; motion to dismiss; response to motion to dismiss; response to motion to dismiss; reply in support of motion to dismiss; order referring motion to dismiss to merits panel; supplemental authority; submission order; supplemental authority; judgment and opinion; Volume 2 - amendment to opinion; petition for rehearing en banc; response to petition for rehearing; motion to strike or file reply; order on rehearing; motion to vacate judgment;; response to motion to vacate/motion for extension; order re: change in panel; Volume 3 - response to motion to vacate/x-motion for enforcement; motion to supplement; response to motion to supplement; reply in support of motion to vacate/response to x-motion for enforcement; reply in support of motion for enforcement; reply in support of motion to supplement; order and judgment; petition for rehearing en banc; response to

petition for rehearing; supplemental authority; supplemental authority; order denying rehearing en banc; Enclosed separately - appendix and supplemental appendix to motion to dismiss; opening brief and appendix; brief of amici curiae; opening/response brief and supplemental appendix; opening response brief; answer/reply brief and supplemental appendix; reply brief; reply brief; 3-volume supplemental record on appeal (d.c.); 2nd supplemental appendix; clerk's statement re: record; and clerk's certificate. (sts) [99-1351 99-1352 99-1353]

U.S. District Court for the District of Colorado

No. 1:89-cv-01154-RPM

07/06/1989	N/A	Complaint [not on docket sheet because filed under seal]
		* * *
12/28/1990	26	Motion by defendant Rockwell Intl Corp to dismiss case before Judge Jim R. Carrigan (lam) Entered: 12/31/1990)
		* * *
12/28/1990	28	BRIEF by defendant Rockwell Intl Corp in support of motion to dismiss case before Judge Jim R. Carrigan [26-1] (lam) (Entered: 12/31/1990)
		* * *
01/14/1991	31	RESPONSE by plaintiff James S. Stone to motion to dismiss [26-1] (lam) (Entered: 01/15/1991)
		* * *
04/08/1991	38	RESPONSE by plaintiff James S. Stone to motion for protective order staying discovery [36-1] (lam) (Entered: 04/09/1991)
		* * *

08/08/1991	42	ORDER by Judge Jim R. Carrigan: dft's mtn to dismiss is granted in part and denied in part [26-1]; as to plf's first claim, the dft's mtn to dismiss is denied; as to plfs second claim, the dft's mtn is granted; plfs second claim is dismissed; and parties are to meet w/in 11 days in attempt to settle remaining claim; cs1 shall report in writing w/in 15 days after they meet re settlement negotiations (cc: all counsel) ; entry date: 8/12/91 (lam) (Entered: 08/12/1991)
		* * *
09/09/1991	46	ANSWER by defendant Rockwell Intl Corp (lam) (Entered: 09/11/1991)
		* * *
11/07/1991	53	MINUTE ORDER: by Judge Jim R. Carrigan; Jury Trial 8:30 1/4/93 (cc: all counsel) ; entry date : 11/12/91 (lam) (Entered: 11/12/1991)
		* * *
03/26/1992	63	NOTICE by USA declining to intervene in this action (lam) (Entered: 03/27/1992)
		* * *
05/21/1992	65	MOTION by defendant Rockwell Intl Corp to compel adequate written discovery responses by plf James S. Stone (lam) (Entered: 05/22/1992)
		* * *

05/26/1992	69	Second supplemental RESPONSES to dft's first interrogatories by plaintiff James S. Stone to case [0-0] (lam) (Entered: 05/27/1992)

* * *

08/28/1992	76	MOTION by defendant Rockwell Intl Corp for sanctions against plf for failure to comply with discovery order (in bound volume) (gms) (Entered: 08/28/1992)
08/28/1992	77	Attachments (APPENDIX) filed by defendant Rockwell Intl Corp to motion for sanctions against plf for failure to comply with discovery order [76-1] (in bound volume) (gms) (Entered: 08/28/1992)

* * *

09/09/1992	82	COURTROOM MINUTES (Hearing on dft Rockwell's second mtn to compel responses to req for prod # 5 & 6 and dft's mtn for sanctions against plf for failure to comply with discovery order) by Magistrate Judge Bruce D. Pringle: Parties inform court request for production #6 has been resolved; ORDERED request #5 of the mtn to compel is taken under advisement, plfs disclosure statement submitted to court for in camera review; ORDERED plf to provide to dft a list of each category of area of violation, plf to identify each regulation and statute that was violated and supports the claims in the lawsuit ... documents and information to be supplied w/in 40 days or on or before 10/20/92 [74-1]; ORDERED mtn for sanctions is granted in part. Only as to plfs 3rd suppl response, dft is allowed reasonable and necessary fees in determining responses were inapplicable. Dft to submit an affidavit on or before 9/23/92, plf may respond to affidavit on or before 10/5/92. In all other aspects, the mtn for sanctions is denied [76-1]; ; Mag Conf 3:30 10/30/92 ; entry date: 9/16/92 (lam) (Entered: 09/16/1992)

* * *

10/29/1992	92	MOTION by defendant Rockwell Intl Corp for order limiting the evidence plf can present at trial (lam) Modified on 11/04/1992 (Entered: 10/30/1992)
		* * *
12/09/1992	120	MOTION by plaintiff James S. Stone for partial summary judgment (on the issue of dft's liability under False Claims Act) before Judge Jim R. Carrigan (lam) (Entered: 12/09/1992)
12/09/1992	121	Memorandum BRIEF by plaintiff James S. Stone in support of motion for partial summary judgment [120-1] (lam) (Entered: 12/09/1992)
		* * *
12/15/1992	125	MOTION by defendant Rockwell Intl Corp to dismiss complaint before Judge Carrigan for lack of subj matter jurisdiction (lam) Modified on 01/14/1994 (Entered: 12/16/1992)
12/15/1992	126	BRIEF by defendant Rockwell Intl Corp in support of motion to dismiss complaint for lack of subject matter jurisdiction before Judge Jim R. Carrigan [125-1] (lam) (Entered: 12/16/1992)
		* * *
03/08/1993	149	MEMORANDUM OF LAW by plaintiff James S. Stone in opposition to motion to dismiss complaint for lack of subject matter jurisdiction before Judge Jim R. Carrigan [125-1] (lam) (Entered: 03/08/1993)

03/08/1993	150	AFFIDAVIT of James S. Stone regarding opposition brief [149-1] (lam) (Entered: 03/08/1993)

* * *

04/13/1993	154	REPLY Brief by defendant Rockwell Intl Corp in support of dft's motion to dismiss complaint for lack of subject matter jurisdiction [125-1] (lam) (Entered: 04/13/1993)

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04/13/1993	156	AFFIDAVIT of John F. McNett (faxed signature) (lam) (Entered: 04/13/1993)
04/13/1993	157	AFFIDAVIT of Christopher J. Koenigs (lam) (Entered: 04/13/1993)

* * *

05/12/1993	162	SURREPLY Memorandum of law by plaintiff James S. Stone in opp to dft's motion to dismiss complaint for lack of subject matter jurisdiction [125-1] (lam) (Entered: 05/13/1993)

* * *

05/20/1993	165	Sur-SURREPLY brief by defendant Rockwell Intl Corp in support [125-1] of motion to dismiss complaint for lack of subject matter jurisdiction [125-1] (lam) (Entered: 05/21/1993)

11/30/1993	166	STATEMENT (Letter) by plaintiff James S. Stone in regards recently decided case and proposed legislation that bear on motion by dft Rockwell to dismiss complaint [125-1] (lam) (Entered: 12/01/1993)
		* * *
12/14/1993	169	Supplemental BRIEF FILED by defendant Rockwell Intl Corp in support of dft's mtn to dismiss [125-1] (lam) (Entered: 12/15/1993)
		* * *
02/02/1994	173	ORDER by Judge Jim R. Carrigan: denying dft's motion to dismiss for lack of subject matter jurisdiction is denied [125-1] ; status report re settlement negotiations 2/17/94 (cc: all counsel) ; entry date: 2/3/94 (lam) (Entered: 02/03/1994)
		* * *
11/07/1995	256	ORDER by Chief Judge Richard P. Matsch Case reassigned to Chief Judge Richard P. Matsch (cc: all counsel) ; entry date: 11/9/95 (lam) (Entered: 11/09/1995)
11/14/1995	257	MOTION by USA to intervene, ex rel. (lam) (Entered: 11/17/1995)
11/14/1995	258	DECLARATION of John A. Kolar as csl for intv plf USA re motion to intervene, ex rel. [257-1] (lam) (Entered: 11/17/1995)

11/14/1995	259	BRIEF (Memorandum of points & authorities) by intervenor-plaintiff USA in support of motion to intervene [257-1] (lam) (Entered: 11/17/1995)

* * *

12/14/1995	271	RESPONSE by defendant Rockwell Intl Corp to Gov'ts motion to intervene, ex rel. [257-1] (lam) (Entered: 12/15/1995)

* * *

11/19/1996	286	MEMORANDUM, OPINION, AND ORDER: by Chief Judge Richard P. Matsch granting motion to intervene, ex rel. by US [257-1] adding plaintiff USA, ex rel. (cc: all counsel) ; entry date: 11/20/96 (lam) (Entered: 11/20/1996)

* * *

12/20/1996	299	AMENDED COMPLAINT by plaintiff USA, ex. rel. James S. Stone; adding The Boeing Corp., Boeing North American, Inc. (lam) (Entered: 12/20/1996)

* * *

01/21/1997	303	ANSWER by defendants to amended complaint [299-1] (lam) (Entered: 01/22/1997)

* * *

10/01/1997	388	TRANSCRIPT of proceedings before JudgeMatsch of preliminary ptc of 9/26/97 (1-57 pages) Prepared By: Federal Reporting Service Inc (lam) (Entered: 10/02/1997))
		* * *
11/10/1997	394	MOTION by defendant Rockwell Intl Corp in limine re: criminal charges (former empl) Modified on 11/12/1997 (Entered: 11/12/1997)
11/10/1997	395	EXHIBIT 49 to dfts' motion in limine re: criminal charges [394-1] (placed in exhibit room) (former empl) Modified on 11/12/1997 (Entered: 11/12/1997)
11/10/1997	396	APPENDIX (Vols I-V) filed by defendants to motion in limine re: criminal charges [394-1] (placed in exhibit room) (lam) Modified on 11/12/1997 (Entered: 11/12/1997)
		* * *
11/14/1997	398	COURTROOM MINUTES by Chief Judge Richard P. Matsch denying motion in limine re: criminal charges [394-1] ; claim re: plutonium in duct work will be severed attrial; status confheld 11/14/97 , ; further status conf set for 3:00 12/5/97 ; entry date: 11/17/97 Court Reporter: Kathy Terasaki, ECR (former empl) (Entered: 11/17/1997)

11/14/1997	399	ORDER by Chief Judge Richard P. Matsch denying motion in limine re: criminal charges [394-1] (cc: all counsel) ; entry date: 11/17/97 (former empl) (Entered: 11/17/1997)

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04/16/1998	424	AMENDED ANSWER to amended cmp [303-1] by defendant Rockwell Intl Corp, defendant Boeing Corporation, defendant Boeing North Amer (lam) (Entered: 04/17/1998)

* * *

09/21/1998	543	Memorandum of Law (BRIEF) FILED by defendants supporting their proposed jury instructions relating to false claims act elements of liability and damages (lam) (Entered: 09/22/1998)

* * *

09/28/1998	555	TRANSCRIPT of proceedings before Chief Judge Matsch of 9/25/98 Status Conf (1-53 pages) Prepared By: Federal Reporting Service Inc (lam) (Entered: 09/29/1998)

* * *

10/09/1998	558	RESPONSE by plaintiff James S. Stone to dfts' memorandum on proposed jury instructions pertaining to Mr. Stone's role as relator re brief [556-1] (lam) (Entered: 10/09/1998)

* * *

10/28/1998	565	Unopposed MOTION by defendants for leave to file reply brief re Stone's alleged role as qui tam relator (former empl) (Entered: 10/29/1998)
10/28/1998	N/A	Tendered Reply Brief Re Stone's Alleged Role As Qui Tam Relator submitted by defendants pending ruling on motion for leave to file reply brief re Stone's alleged role as qui tam relator [565-1] (former empl) (Entered: 10/29/1998)

* * *

11/20/1998	568	MOTION by plaintiff James S. Stone for leave to file surreply brief re alelged role as qui tam relator (former empl) (Entered: 11/23/1998)
11/20/1998	N/A	Tendered surreply brief submitted by plaintiff James S. Stone motion for leave to file surreply brief re alelged role as qui tam relator [568-1] (former empl) (Entered: 11/23/1998)

* * *

11/24/1998	575	Supplemental REPLY brief by defendant Rockwell Intl Corp, defendant Boeing North Amer re: Mr. Stone's alleged role as qui tam realtor (former empl) (Entered: 11/27/1998)
11/24/1998	576	SurREPLY by plaintiff James S. Stone to def reply brief re: Mr. Stone's alleged role as qui tam realtor (former empl) (Entered: 11/27/1998)

* * *

02/04/1999	616	PRE- TRIAL ORDER by Chief Judge Richard P. Matsch (cc: all counsel) (former empl) (Entered: 02/05/1999)

* * *

02/12/1999	628	MOTION by plaintiff, defendant, special master, intervenor, plaintiff, defendant for order accepting stipulation to admissibility of exhibits (former empl) (Entered: 02/16/1999)

* * *

02/17/1999	630	STIPULATION re Mr. Stone status as relator or right to relief (former empl) (Entered: 02/18/1999)

* * *

02/22/1999	640	TRANSCRIPT of proceedings of FINAL PRETRIAL CONFERENCE (2/19/99) (pages 1-41) Prepared By: Federal Reporting Service (former empl) (Entered: 02/22/1999)

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02/23/1999	643	TRANSCRIPT of proceedings of 2/22/99 (202 pages) Prepared By: Fed Rptg (former empl) (Entered: 02/24/1999)

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02/24/1999	644	TRANSCRIPT of proceedings of 2/23/99 (442 pages) Prepared By: Fed Rptg (former empl) (Entered: 02/25/1999)
		* * *
02/25/1999	647	TRANSCRIPT of proceedings of 2/24/99 (706 pages) Prepared By: Fed Rptg (former empl) (Entered: 02/26/1999)
		* * *
02/26/1999	649	TRANSCRIPT of proceedings of 2/25/99 (945 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/01/1999)
		* * *
03/01/1999	653	TRANSCRIPT of proceedings of 2/26/99 (1064 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/01/1999)
		* * *
03/02/1999	655	TRANSCRIPT of proceedings of 3/1/99 (1313 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/02/1999)
		* * *
03/03/1999	665	TRANSCRIPT of Trial to Jury, Day 7 on 3/2/99 before Chief Judge Matsch (1314-1569 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/03/1999)
		* * *

03/04/1999	668	TRANSCRIPT of proceedings of 3/3/99 (1815 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/05/1999)
		* * *
03/05/1999	669	TRANSCRIPT of proceedings of 3/4/99 (2055 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/08/1999)
		* * *
03/09/1999	681	TRANSCRIPT of Trial to Jury, Day 10 before Judge Matsch (2056-2323 pages) Prepared By: Federal Rpt Svc. (gms) (Entered: 03/09/1999)
		* * *
03/10/1999	689	TRANSCRIPT of Trial to Jury, Day 11 on 3/9/99 before Judge Matsch (2324-2585 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/11/1999)
		* * *
03/11/1999	695	TRANSCRIPT of Trial to Jury, Day 12 before Judge Matsch (2586 through 2809 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/12/1999)
		* * *
03/12/1999	698	TRANSCRIPT of Trial to Jury, Day 13 before Judge Matsch (2810-3068 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/12/1999)

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03/16/1999	702	TRANSCRIPT of Trial to Jury, Day 14 before Judge Matsch (3069-3346 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/16/1999)

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03/17/1999	710	TRANSCRIPT of Trial to Jury, Day 15 before Judge Matsch (3347-3575 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/18/1999)
03/18/1999	711	TRANSCRIPT of Trial to Jury, Day 16 before Judge Matsch (3576-3849 pages) Prepared By: Federal Reporting Service (former empl) (Entered: 03/19/1999)

* * *

03/19/1999	712	TRANSCRIPT of Trial to Jury, Day 17 before Judge Matsch on 3/18/99 (3850-4119 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/22/1999)

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03/22/1999	718	TRANSCRIPT of Trial to Jury, Day 18 on 3/19/99 before Judge Matsch. (4120-4238 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/23/1999)

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03/23/1999	722	TRANSCRIPT of Trial to Jury, Day 19 on 3/22/99 before Judge Matsch. (4239-4509 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/24/1999)
		* * *
03/24/1999	724	TRANSCRIPT of proceedings of Trial to Jury, day 20 on 3/23/99 before Judge Matsch (4510-4762 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/24/1999)
		* * *
03/25/1999	728	TRANSCRIPT of proceedings of 3/24/99 (4914 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/25/1999)
		* * *
03/26/1999	736	TRANSCRIPT of proceedings of 3/25/99 (5032 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/30/1999)
		* * *
03/29/1999	737	TRANSCRIPT of proceedings of 3/26/99 (5057 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/30/1999)
		* * *
03/30/1999	740	TRANSCRIPT of proceedings of 3/29/99 (5276 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/30/1999)

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03/31/1999	742	TRANSCRIPT of proceedings of 3/30/99 (5326 pages) Prepared By: Fed Rptg (former empl) (Entered: 04/01/1999)

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04/01/1999	744	TRANSCRIPT of proceedings of 3/31/99 (5336 pages) Prepared By: Fed Rptg (former empl) (Entered: 04/02/1999)

* * *

04/01/1999	747	VERDICT for plaintiff James S. Stone, plaintiff USA against defendant Rockwell Intl Corp, defendant Boeing North Amer ; entry date: 4/2/99 (former empl) (Entered: 04/02/1999)
04/02/1999	748	TRANSCRIPT of proceedings of 4/1/99 (5346 pages) Prepared By: Fed Rptg (former empl) (Entered: 04/05/1999)

* * *

04/16/1999	751	BRIEF FILED by defendant Rockwell Intl Corp, defendant Boeing North Amer re: entry of judgment on verdict [747-1] (former empl) (Entered: 04/19/1999)
04/16/1999	752	APPENDIX filed by defendant Rockwell Intl Corp, defendant Boeing North Amer re: brief [751-1] (former empl) (Entered: 04/19/1999)

* * *

05/04/1999	760	RESPONSE by plaintiff James S. Stone, plaintiff USA to brief [751-1] (former empl) (Entered: 05/07/1999)
05/04/1999	761	RESPONSE by plaintiff James S. Stone to brief [751-1] (former empl) (Entered: 05/07/1999)

* * *

05/06/1999	764	SUPPLEMENT by plaintiff USA response [760-1] (former empl) (Entered: 05/07/1999)

* * *

05/06/1999	766	REPLY by defendant Rockwell Intl Corp, defendant Boeing North Amer response [761-1] (former empl) (Entered: 05/07/1999)

* * *

05/10/1999	770	TRANSCRIPT of proceedings of 5/7/99 (20 pages) Prepared By: Federal Reporting Service (former empl) (Entered: 05/11/1999)
05/13/1999	772	ORDER by Chief Judge Richard P. Matsch Clk to enter final jgm under RRCP 54(b) awarding plf compensatory damages of $4,172,325 and pymt to US of civil penalty of $15,000 on Count 1 of Amended Complaint; jgm to enter for defs dismissing w/prejudice counts 2-5 of amended complaint; bill of costs due 10 day from entry of j gm (cc: all counsel) entry date: 5/13/99 (former empl) (Entered: 05/13/1999)

05/13/1999	773	JUDGMENT: by Clerk James R. Manspeaker, approved by Chief Judge Matsch regarding [772-1] order; plf to recover from defs compensatory damages of $4,172,325 on Count One of Amended Complaint; defs to pay to US civil penalty of $15,000 on Count 1 of Amended Complaint; counts 2-5 of amended complaint dismissed w/prejudice; bill of costs to be submitted within 10 days (cc: all counsel); entry date: 5/13/99 (former empl) (Entered: 05/13/1999)
05/26/1999	777	AFFIDAVIT of William R. Gray motion for attorney fees and expenses [776-1] (former empl) Entered: 05/28/1999)

* * *

05/27/1999	776	MOTION by plaintiff James S. Stone for attorney fees and expenses (former empl) (Entered: 05/28/1999)
05/27/1999	778	MOTION by defendant Rockwell Intl Corp to dismiss for lack of jurisd, or for hearing (former empl) (Entered: 05/28/1999)

* * *

05/27/1999	781	SUPPLEMENT (submission of predecessor counsel's fees and costs) by plaintiff James S. Stone motion for attorney fees and expenses [776-1] (former empl) (Entered: 06/01/1999)

* * *

06/10/1999	786	ORDER by Chief Judge Richard P. Matsch regarding [776-1] motion for attorney fees and expenses ruling reserved pending outcome of appeals (cc: all counsel); entry date: 6/10/99 (former empl) (Entered: 06/10/1999)
		* * *
06/10/1999	790	ORDER by Chief Judge Richard P. Matsch granting motion for order correcting clerical error in jgm [775-1] (cc: all counsel) ; entry date: 6/10/99 (former empl) (Entered: 06/10/1999)
		* * *
06/10/1999	792	AMENDMENT to judgment; plf shall have and recover from dfts $4,172,327.40 on count 1; dfts shall pay civil penalty of $15,000 on count 1, counts 2-5 of the amend comp dismissed w/prej; interest to accrue at 4.727% plus costs [773-1] (former empl) (Entered: 06/10/1999)
		* * *
08/09/1999	794	MOTION by defts Rockwell Intl Corp, Boeing North Amer for written order of ruling on renewed motion to dismiss plts claim for lack of jurisdiction or in the alternative for hearing on such motion (gms) (Entered: 08/09/1999)

08/09/1999	795	NOTICE OF APPEAL by plaintiff James S. Stone in re: amended final judgment of 6/10/99 [792-1], order [789-1] of 6/10/99 and any other adverse orders or rulings that impacted the jury's erroneous damages verdict under False Claims Act; Notice of transcript order form due 8/19/99 ; Notice mailed to all counsel on 8/9/99 (gms) (Entered: 08/09/1999)
08/09/1999	N/A	$100.00 fee and $5.00 fee paid. Receipt No 208224. re: appeal [795-1] (gms) (Entered: 08/09/1999)
08/09/1999	796	NOTICE OF APPEAL by defts Rockwell Intl Corp, Boeing North Amer in re: judgment [773-1] of 5/13/99 as amended [792-1] on 6/10/99; Notice mailed to all counsel on 8/9/99 (gms) (Entered: 08/09/1999)
08/09/1999	N/A	$100.00 fee and $5.00 fee paid. Receipt No 208233. re: appeal [796-1] (gms) Entered: 08/09/1999)
08/09/1999	797	NOTICE OF APPEAL by plaintiff USA in re: amended judgment of 6/10/99 [792-1], order for entry of final judgment pursuant to Rule 54 (b) [772-1], order denying pltfs' motion for new trial re: damages [789-1] & order [791-1] denying pltf USA's motion to alter or amend judgment; Notice mailed to all counsel on 8/9/99 Fee Status: USA (gms) (Entered: 08/09/1999)

* * *

08/11/1999	799	ORDER by Chief Judge Richard P. Matsch denying nunc pro tunc 6/10/99 motion to dismiss for lack of jurisd [778-1], denying motion for hearing [778-2] (cc: all counsel) ; entry date: 8/12/99 (former empl) Entered: 08/12/1999)
08/12/1999	800	RESPONSE by plaintiff James S. Stone to motion for written order of ruling on renewed motion to dismiss pltf's claim for lack of jurisdiction or in the alternative for hearing on such motion [794-1] (former empl) (Entered: 08/12/1999)

* * *

03/06/2002	809	Copy of ORDER on Rehearing and Published Opinion from Court of Appeals [797-1], [796-1], [795-1] the petition for rehearing by the panel has been considered by the panel and it has been determined that rehearing is granted for the limited purpose of modifying the opinion and ordering a limited remand to the USDC; the limited remand to the USDC is for the purpose of making findings of fact and conclusions concerning the issue of disclosure prior to filing of this acting in accordance w/the False Claims Act, concerning the saltcrete, pondcrete and irrigation matters and any further proceedings in the USDC which the Judge deems necessary; upon completion, a suppl record will be transmitted to the USCA and the USCA will otherwise retain jurisdiction of this cause; upon receipt of the suppl record, final disposition of these appeals will be made (former empl) (Entered: 03/06/2002)
04/04/2002	810	MOTION by plaintiff James S. Stone for a finding on limited remand that Mr. Stone made the requisite disclosures to the Government prior to filing this action (lam) (Entered: 04/04/2002)
04/04/2002	811	Memorandum (BRIEF) by plaintiff James S. Stone in support of motion for a finding on limited remand [810-1] (lam) (Entered: 04/04/2002)

04/04/2002	812	AFFIDAVIT of Maria T. Vullo in support of motion for a finding on limited remand [810-1] (lam) (Entered: 04/04/2002)
04/04/2002	813	Excerpts from the RECORD (Volume I of II) by plaintiff James S. Stone (placed in exhibit room) (lam) (Entered: 04/04/2002)
04/04/2002	814	Excerpts from the RECORD (Volume II of II) by plaintiff James S. Stone (placed in exhibit room) (lam) (Entered: 04/04/2002)
04/24/2002	815	RESPONSE by defendants to plaintiff Stone's motion for a finding that he made the requisite pre-filing disclosures to the government [810-1] (lam) (Entered: 04/25/2002)
04/24/2002	816	Additional RECORD on Remand by defendants (placed in exhibit room) (lam) (Entered: 04/25/2002)
04/24/2002	817	Additional Excerpts from Appellate RECORD by defendants (placed in exhibit room) (lam) (Entered: 04/25/2002)

* * *

05/07/2002	819	MOTION by defendants for finding that plf Stone lacked direct & independent knowledge of info on which his spray irrigation allegations are based (lam) Modified on 05/22/2002 (Entered: 05/08/2002)

05/09/2002	820	REPLY Memorandum by plaintiff James S. Stone to response to motion for a finding on limited remand [810-1] (lam) (Entered: 05/10/2002)
05/22/2002	821	RESPONSE by plaintiff James S. Stone to Rockwell's motion for finding regarding "Direct and Independent Knowledge" [819-1] (lam) (Entered: 05/22/2002)
05/22/2002	822	AFFIDAVIT of Maria T. Vullo in support of Stone's motion response [821-1], to Rockwell's motion for finding regarding "Direct and Independent Knowledge" [819-1] (lam) (Entered: 05/22/2002)
06/06/2002	823	REPLY Brief by defendants in support of motion for a finding that pla Stone lacked direct & independent knowledge of info on which his spray irrigation allegations are based [819-1] (lam) (Entered: 06/07/2002)
		* * *
12/02/2002	838	TRANSCRIPT of Oral Argument on Limited Remand on 11/25/02 before Judge Matsch (pages: 1-54) Prepared By: Federal Reporting Service, Inc. (certified copy) (lam) (Entered: 01/21/2003)

12/17/2002	828	ORDER by Judge Richard P. Matsch denying dfts' motion for finding that plf Stone lacked direct & independent of info on which his spray irrigation allegations are based [819-1] (cc: all counsel) ; entry date: 12/18/02 (lam) (Entered: 12/18/2002)
12/17/2002	829	Findings and Conclusions on Limited Remand (ORDER) by Judge Richard P. Matsch regarding [828-1] order, regarding [809-1] appeal. Order findings and conclusions to be forwarded to clerk of USCA together with papers filed subsequent to order of limited remand as a supplemental record on pending appeal (cc: all counsel) ; entry date: 12/23/02 (msn) (Entered: 12/23/2002)
12/23/2002	830	RECORD on appeal, consisting of supplemental volumes I, II, and III re: appeal [797-1], appeal [796-1], appeal [795-1] transmitted to the Court of Appeals. (msn) (Entered: 12/23/2002)

* * *

01/24/2003	840	LETTER (Re: [795-1], [796-1], [797-1]) to USCA supplementing the preliminary record with a current copy of docket sheet, Plaintiff James S. Stone's Motion for Reconsideration and to Supplement the Record of 12/24/02 and Order of 1/21/03. (msn) (Entered: 01/24/2003)

* * *

04/05/2006	855	ORDER of USCA re: [796] Notice of Appeal, [797] Notice of Appeal and [795] Notice of Appeal. Plaintiffs motion for an award of attorneys' fees is granted and the matter is remanded to district court for a determination of a reasonable fee award.(gms,) (Entered: 04/07/2006)
04/17/2006	856	Letter from 10CCA regarding writ of certiorari was filed on 4/4/06 re [796] Notice of Appeal, [797] Notice of Appeal, [795] Notice of Appeal and assigned Supreme Court No. 05-1272. (Appeal No. 99-1351, 99-1352, 99-1353) (djs,) (Entered: 04/19/2006)
10/12/2006	857	USCA LETTER re Appeals: The Clerk of the Supreme Court has notified us that a petition for writ of certiorari limited to Question 1 presented by the petition filed in the captioned cases was granted. (Supreme Court case no. 05-1272) (USCA case No's. 99-1351, 99-1352, 99-1353) (bjr2,) (Entered: 10/13/2006)

[filed 7-5-89]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Clerk's Stamp Illegible]

Civil Action No. 89 C 1154

UNITED STATES OF AMERICA,
ex rel., and JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION, a corporation,

Defendant.

COMPLAINT UNDER FALSE CLAIMS ACT

DEMAND FOR JURY TRIAL

FILED IN CAMERA AND UNDER SEAL

I. INTRODUCTION

1. This is an action to recover damages and civil penalties for the wrongful conduct and acts of defendant Rockwell International Corporation, ("Rockwell") including, but not limited to, the making of false or fraudulent claims, the making of false records or statements, the entering into of a conspiracy to defraud the United States Government, and the concealing of deficient deliveries of property, all to induce the United States Government to pay and continue to pay billions of dollars, in violation of the Federal False Claims Act, 31 U.S.C. §3729, et seq. (as amended, Pub.L. 99-

562, Oct. 27, 1986, 100 Stat. 3153, et seq.) hereinafter referred to as the "False Claims Act".

2. This is also an action for damages, including reinstatement of employment with other relief, brought by JAMES S. STONE (hereinafter "Stone"), a former employee of Rockwell, arising from the vindictive acts committed by said defendant against Stone in retaliation for the lawful acts of Stone, including the investigation of matters underlying the initiation of this action.

3. The False Claims Act, originally enacted in 1863 during the United States Civil War, was substantially amended by the False Claims Amendments Act of 1986, signed into law on October 27, 1986. The purpose of said amendments was to enhance the Government's ability to recover for losses sustained as a result of false or fraudulent means used against the United States Government to obtain payment or receipt of monies. After finding that false and fraudulent practices in federal programs and procurement were so pervasive, the Government determined that the False Claims Act, characterized as the primary tool for combating such practices in government contracting, was in need of modernization. Consequently the 1986 amendments were intended by Congress to create incentives to persons, who are aware of such false or fraudulent practices used against the Government, to disclose such information without fear of reprisal or Government inaction.

4. As amended, the False Claims Act expressly establishes civil liability for any person who commits certain acts, including knowingly presenting a false or fraudulent claim for payment or approval, knowingly making or using a false record or statement to obtain payment or approval of a false claim, conspiring to defraud the Government to induce payments, concealing or delivering a deficient amount of property used or to be used by the Government, and making or delivering a document certifying receipt of property without knowing that the information on the receipt is true. The liability that flows from said acts includes a civil penalty

of not less than $5000 and not more than $10,000 for each such act, plus three times the amount of the damages sustained by the Government because of the said act. The False Claims Act allows any person having knowledge of such acts to bring an action in the United States District Court for himself and for the United States Government, and to share in any recovery. The complaint is to be filed in camera and under seal for 60 days (without service on the defendant during the 60 day period) to enable to Government to determine whether it wishes to proceed with the action. At or about the time the Complaint is filed, a copy of the Complaint and written disclosure of substantially all material evidence and information the individual plaintiff possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedures.

5. Based on the aforesaid provisions, Stone seeks through this action to recover for the United States Government and for himself damages and civil penalties arising from acts of Rockwell perpetrated under, or associated with, contracts with the U.S. Department of Energy ("D.O.E.") and Department of Defense ("D.O.D."). The amount of damages, not including any civil penalties or treble damages provisions that may be assessed, sustained by the Government as a result of the defendant's acts, is in excess of $1 billion.

6. At about the time of the filing of this Complaint, plaintiff Stone shall file, in camera and under seal, proof of service of plaintiff's written disclosure of material evidence and information, along with a copy of this Complaint, on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.

II. PARTIES

7. Stone is a citizen of the United States and a resident of the State of New Jersey. He is a Professional Engineer, registered as such in the States of Colorado, Wyoming, Idaho, Utah and New Mexico. Stone has

extensive experience and qualifications, covering more than 40 years, in engineering and defense contracting related matters. Attached hereto as Exhibit "A" is a copy of Stone's resume with attached documents evidencing his engineering achievements and commendations. Stone was employed by defendant Rockwell from November 1980 until March 1986 as an engineer, holding various titles including that of Lead Principal Engineer in the Utility Design Department, Facility Engineering Division, of Rockwell's Rocky Flats operations near Golden, Colorado.

8. On behalf of himself and the United States Government pursuant to 31 U.S.C. §3730, et seq., Stone brings this action against Rockwell by reason of the egregious violations by defendant of the False Claims Act. To the extent that this action may be based on the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office Report, hearing, audit, or investigation, or from the news media, Stone is the "original source" of the information as that term is defined in 31 U.S.C. §3730(e) (4) (B) .

9. Defendant Rockwell is a Delaware corporation, engaged in the design and manufacture of military weapons and electronics equipment, space systems and rocket engines. Rockwell is one of the largest industrial companies in the United States of America with about $12 billion in sales and approximately $800 million in profits for 1988. Rockwell has operated the D.O.E. facility at Rocky Flats, Colorado ("Rocky Flats Plant") under contract with D.O.E. since about 1975. Rockwell's present contract with D.O.E., for a term of 5 years, would produce gross revenue of approximately $2.5 billion. (See attached Exhibit "B" which a true copy of a June 20, 1989 Rocky Mountain News "Special Report.") The Rocky Flats Plant is located approximately eight miles south of Boulder, Colorado, in Jefferson County, Colorado, with postal delivery at Golden, Colorado.

III. JURISDICTION AND VENUE

10. This is a civil action arising under the laws of the United States to redress violations of 31 U.S.C. §3729, et seq., also known as the "False Claims Act". As such, this Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1331 and 31 U.S.C. §3732, which specifically confers jurisdiction on this Court for actions brought pursuant to §§3729 and 3730 of Title 31.

11. This Court also has jurisdiction pursuant to 28 U.S.C. §1332, in that there is diversity of citizenship as between Stone and Rockwell, and the amount in controversy exceeds $10,000, exclusive of interest and costs.

12. The Court has jurisdiction over Rockwell, pursuant to 31 U.S.C. §3732(a), as defendant committed wrongful acts and submitted false claims to the United States Government through its operations at the Rocky Flats Plant to obtain payment or approval by the United States Government.

13. Venue is proper in this District pursuant to 31 U.S.C. §3732(a) as Rockwell has transacted business in the District of Colorado and committed in this district the acts proscribed by 31 U.S.C. 3729, et seq.

IV. FACTS

14. From at least as early as November 1980, and continuing thereafter, Rockwell has been legally required to comply with certain federal and state regulations, statues, laws, and agreements, including but not limited to:

(a) D.O.E. Orders including 5483.1, as superceded by 5483.1A, for Occupational Safety and Health Program for Government-Owned Contractor-Operated facilities, 6430.1, the D.O.E. General Design Criteria Manual, and 5480.2 ("D.O.E. Orders");

(b) Colorado Statutes including Hazardous Substances at C.R.S. 25-5-501, et seq., the Air Quality Control Program at C.R.S. §§25-7-101, et seq., Asbestos Control at C.R.S. 25-7-501, et seq., the Colorado Hazardous Waste Act at C.R.S. §§25-15-101, et seq., the Water

Quality Control Act at C.R.S. 25-8-201, et seq., Radiation Control at C.R.S. 25-11-101, et seq., Hazardous Substance Incidents at C.R.S. §29-22-101, et seq., and specific provisions defining prohibited acts and reporting requirements with respect to hazardous substances, for example C.R.S. §§ 25-5-503, 25-8-506 and 608, 25-15-308, 309, 310, 29-22-101 and 108, (such state statutes and any applicable regulations hereinafter referred to as the "Colorado Environmental Laws");

(c) Federal statutes including Occupational Safety and Health Act at 29 U.S.C. §651, et seq., the Atomic Energy Act of 1954, as amended, at 42 U.S.C. §2011, et seq, the Energy Reorganization Act of 1974 at 42 U.S.C. §5801, et seq., the Water Pollution Prevention and Control Act at 33 U.S.C. §1251, et seq., the Clean Air Act at 42 U.S.C. §7401, et seq., the Resource Conservation and Recovery Act at 42 U.S.C. §6901, et seq., the Safe Drinking Water Act at 42 U.S.C. §300f, et seq., and federal regulations applicable or enacted under the foregoing statutes including, but not limited to portions of Code of Federal Regulations, Titles 10, 29, 40, as well as Executive Order No. 12088, (hereinafter said federal statutes, regulations, and orders, are referred to as the "Federal Environmental and Safety Laws");

(d) Agreements including the June 4, 1986 Agreement in Principle between D.O.E., the Environmental Protection Agency ("EPA") and the State of Colorado, the July 30, 1986 Compliance Agreement between D.O.E., EPA, and the State of Colorado, and the January 8, 1975 Rockwell contract with D.O.E., renewals thereof, and later dated contracts including a Supplemental Agreement, effective January 1, 1989 ("the Rockwell-D.O.E. Contracts").

15. Rockwell, from about November 1980 and continuing thereafter, has committed and is presently

committing numerous and repeated violations of the above referenced D.O.E. Orders, Colorado Environmental Laws, Federal Environmental and Safety Laws, and agreements in connection with its operation of the Rocky Flats Plant. In order to induce the government to make payments or approvals, Rockwell committed numerous and continuing acts, in violation of the False Claims Act, 31 U.S.C. Section 3729(a), including the following:

(a) Knowingly presenting or causing to be presented to an officer or employee of the United States Government, false and fraudulent claims for payment or approval, including all requests or statements for payment, statements for reimbursement of costs, and applications for bonuses in connection with or under the Rockwell-D.O.E. Contracts;

(b) Knowingly making, using, or causing to be made or used, false records or statements intended to obtain approval and payment of the monies referred to in subpart (a), above;

(c) Conspiring with others to defraud the United States Government in order to obtain approval of a false or fraudulent claim, and thereby induce approvals and payments of the monies referred to in subpart (a) above;

(d) Having possession, custody, or control of property or money used, or to be used, by the United States Government and intending to defraud the Government, delivering or causing to be delivered to the Government less property in quality and quantity than that to which the Government was entitled;

(e) Making or delivering documents certifying receipt of property used, or to be used, by the United States Government and, with the intent to defraud the Government, making or delivering a receipt without completely knowing that the information on the receipt is true; or

(f) Knowingly making, using, or causing to be made or used, false records or statements to conceal, avoid, or decrease an obligation to pay or transmit money or property to the United States Government.

16. Rockwell's contractual and legal obligations to be performed at the Rocky Flats Plant involved and presently involves two aspects of the handling and production of Government property which are of paramount importance to the national security of the United States: (1) the production and re-processing of detonation devices ("triggers") for nuclear warheads, using materials including plutonium and beryllium. (Said production and re-processing is referred to hereinafter as "Nuclear Trigger Operations".); (2) the receiving, processing, and shipment of materials, including hazardous wastes generated at Rocky Flats, as well as wastes received from other facilities, which have, in some instances, significant value as recoverable or recyclable Government property. (Said material processing is referred to hereinafter as "Waste and Recovery Operations".)

17. In performing the aforesaid Nuclear Trigger Operations and Waste and Recovery Operations, Rockwell knowingly caused the United States Government to receive less property, or property of a diminished value or usefulness, than that to which the United States Government was entitled; and further that Rockwell has concealed the relevant facts from the Government so as to continue to receive payments or approvals. (A more detailed statement of defendant's violations in this regard would require Stone to reveal information bearing upon matters of national security.)

18. From at least November 1980 to the present all monies and payments approved on application of Rockwell and/or received by Rockwell, including annual guaranteed fees, bonuses awarded due to Rockwell's performance, and reimbursement of the expenses and costs of operating the Rocky Flats Plant, in a total amount presently

unascertained, were so applied for and received by defendant with the knowledge and intention on defendant's part to defraud and deceive the United States Government, all in violation of the False Claims Act.

19. In committing the above alleged acts, Rockwell knowingly concealed and intended to conceal the true nature of its numerous and continuous violations of the D.O.E. Orders, Colorado Environmental Laws, Federal Environmental and Safety Laws, and agreements, as alleged above, with the intent to induce the Government to make and continue to make payments to Rockwell in connection with the operation of Rocky Flats Plant. Had the Government known the true nature and extent of Rockwell's violations, as well as its concealment of said violations, it would not have made payments and continued to make payments to Rockwell, as described herein.

20. At all relevant times, Rockwell conspired with others to conceal the true nature and extent of its violations, to ensure an uninterrupted stream of payments to Rockwell, to resist clean-up and monitoring actions of the Rocky Flats Plant by environmental and public health agencies, and to avoid enforcement litigation brought by governmental agencies or private citizens. Rockwell, and those it has conspired with, have committed acts in furtherance of said conspiracy in reckless disregard of the actual extent to which their actions have endangered the health and safety of the workers at Rocky Flats Plant and the nearly two million citizens living and working in the surrounding metropolitan area.

FIRST CLAIM FOR RELIEF

(Under False Claims Act)

21. Plaintiffs reallege and hereby incorporate by reference each and every allegation contained in paragraphs 1 through 20 of this Complaint.

22. This is a claim for treble damages and forfeitures under the Federal False Claims Act, 31 U.S.C. §3729, et seq.

(as amended, Pub.L. 99-562, Oct. 27, 1986, 100 Stat. 3153, et seq.).

23. By virtue of the acts alleged, Rockwell has obtained, and continues to obtain, payments and approvals from the United States Government in connection with its operation of the Rocky Flats Plant.

24. The United States Government, unaware of the nature and extent of the wrongful acts committed by Rockwell, made said payments and approvals, and may continue to do so, in reliance on false information, documents, reports, and statements made by Rockwell.

25. By reason of the aforesaid wrongful conduct and acts of Rockwell, the United States of America has been damaged in an amount estimated to be in excess of $1 billion. Plaintiffs will seek leave to amend the Complaint to reflect the true nature and amounts of said damages, which are continuing, when the same have been ascertained.

SECOND CLAIM FOR RELIEF

(Plaintiff James S. Stone's Claim for Discrimination and Harassment Under 31 U.S.C. §3730(h))

26. Stone realleges and hereby incorporates by reference each and every allegation contained in paragraphs 1 through 25 of this Complaint.

27. This is a claim for reinstatement, with back pay, special damages, litigation costs, and attorney's fees under the False Claims Act, 31 U.S.C. §3730(h).

28. As a result of his investigation underlying this action, as well as reports and complaints made by Stone consistent with the False Claims Act and the spirit thereof, Stone was, on about March 17, 1986, discharged by Rockwell from his employment as an engineer. Prior to his discharge, Stone was suspended and subjected to employment actions adversely affecting the terms and conditions of his employment.

29. Subsequent to Stone's discharge, Rockwell has subjected Stone to threats and harassment, including threats to institute a criminal prosecution against him.

30. The provisions of 31 U.S.C. §3730(h) afford Stone a private right of action, through an action brought in the appropriate District Court of the United States.

DEMAND FOR JURY

31. Plaintiffs demand a jury as to all issues in this action.

PRAYER

WHEREFORE, plaintiffs pray for judgment against defendant Rockwell International Corporation as follows:

A. On the First Claim for Relief:

1. This Court enter judgment against defendant Rockwell International Corporation in an amount equal to three (3) times the amount of damages the United States Government has sustained, plus a civil penalty of not less than $5000 and not more than $10,000 for each act in violation of 31 U.S.C. §3729;

2. Plaintiff James S. Stone be awarded the maximum award as a Qui Tam plaintiff under the False Claims Act;

3. This Court make findings for and an award of reasonable attorney's fees and all expenses and costs allowable under the False Claims Act; and

4. Such other and further relief as this Court deems just and proper.

B. On the Second Claim for Relief:

1. This Court order defendant Rockwell International Corporation to reinstate plaintiff James S. Stone in the Lead Principle Engineer Position, or its equivalent, with seniority and an award of back pay, interest on back pay, and lost benefits;

2. This Court issue an award of compensatory an/or special damages in order to make James S. Stone whole under the terms of 31 U.S.C. §3730(h);

3. This Court make findings for and an award of reasonable attorney's fees, litigation costs, and court costs pursuant to 31 U.S.C. §3730(h); and

4. Such other and further relief as this Court deems just and proper.

Dated: July 4th, 1989. ~~LEEVAN & ALLEY~~

By /s/ Hartley David Alley
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Specifically for Qui Tam and
Individual Plaintiff,
JAMES S. STONE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 92-CR-107

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROCKWELL INTERNATIONAL CORPORATION,

Defendant.

PLEA AGREEMENT AND STATEMENT OF FACTUAL BASIS

Plaintiff UNITED STATES OF AMERICA and Defendant ROCKWELL INTERNATIONAL CORPORATION ("ROCKWELL") submit this Plea Agreement and Statement of Factual Basis, in connection with criminal charges against ROCKWELL concerning its management and operation of the U.S. Department of Energy's Rocky Flats Plant ("Rocky Flats") near Denver, Colorado, as follows:

I. PLEA AGREEMENT

The UNITED STATES and ROCKWELL have entered into a plea agreement, pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C), whereby ROCKWELL will plead guilty to ten criminal charges, involving violations of the Resource Conservation & Recovery Act, 42 U.S.C. §§ 6901 et seq., and the Clean Water Act, 33 U.S.C. §§ 1251 et seq., and will pay total criminal fines of $18.5 million.

* * *

III. STATEMENT OF FACTUAL BASIS

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish each of the following facts, as set forth in this entire Section III (including Counts 1 through 10), beyond a reasonable doubt:

At all material times, the U.S. Department of Energy ("DOE") was a department and agency of the United States Government responsible for making nuclear material for defense programs. The basic mission of DOE's defense activities was to produce nuclear material for weapons and naval fuel, and to manufacture nuclear weapons components. One of DOE's nuclear weapons facilities was Rocky Flats, located sixteen miles northwest of Denver, Colorado, in northern Jefferson County. The total site covers approximately 6,550 acres and includes more than 100 buildings and other structures.

Several creeks, including North Walnut Creek, South Walnut Creek and Woman Creek, cross Rocky Flats, flowing generally west to east. Three series of holding ponds known as the A, B and C series ponds have been built in North Walnut Creek, South Walnut Creek and Woman Creek, respectively. At all material times, "spray irrigation" was practiced at Rocky Flats to dispose of various wastewaters, contaminated groundwater and plant runoff, by spraying these waters from sprinkler systems at several "spray fields." A spray field known as the East Spray Field was used to dispose of water from the B-3 pond, which received treated wastewater, contaminated groundwater and plant runoff. The East Spray Field was comprised of the North Spray Field, located north of the B-series ponds (in the Walnut Creek drainage), and the South Spray Field, located primarily south of the East Access Road (in the Woman Creek drainage).

At all material times, ROCKWELL was a Delaware corporation headquartered in El Segundo, California. ROCKWELL managed and operated Rocky Flats on DOE's

behalf from June 30, 1975, until December 31, 1989, under several contracts.

The Resource Conservation and Recovery Act of 1976 ("RCRA"), Title 42, U.S.C. §§ 6901 et seq., as amended, prohibits the treatment, storage and disposal of hazardous wastes without a permit or interim status. In order to obtain a RCRA permit or interim status, a facility must submit a RCRA Part A permit application and subsequently a Part B application, which must be approved by federal and/or state authorities. In order to treat, store or dispose of hazardous wastes at an interim status facility, RCRA requires compliance with rules and regulations promulgated at Title 6, Colorado Code of Regulations 1007-3, Colorado Hazardous Waste Regulations ("6 C.C.R. 1007-3"), Parts 265 and 270.

"Hazardous wastes" are those substances and materials listed or otherwise identified as hazardous wastes in 6 C.C.R. 1007-3, Part 261. "Mixed wastes" or "mixed hazardous wastes" are wastes which contain both radioactive wastes and non-radioactive hazardous wastes. "Low-level mixed wastes" are radioactive wastes containing transuranic material at or below 100 nanocuries per gram and also hazardous wastes.

On July 31, 1986, DOE, the United States Environmental Protection Agency ("EPA") and the Colorado Department of Health ("CDH") entered into a compliance agreement in which DOE agreed that Rocky Flats' low-level mixed wastes were RCRA-regulated, by EPA and CDH.

On May 1, 1987, DOE issued a "final interpretive rule" clarifying the applicability of RCRA to all DOE mixed wastes, including low-level mixed wastes. Under this rule, effective June 1, 1987, DOE conceded that the non-radioactive hazardous component of DOE mixed wastes was subject to RCRA regulation. The radioactive component is subject to Atomic Energy Act regulation.

The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251, et

seq., prohibits the discharge of any pollutants from a point source into waters of the United States except in accordance with the terms and conditions of a National Pollutant Discharge Elimination System ("NPDES") permit, issued pursuant to Title 33, United States Code, Section 1342. On November 26, 1984, the EPA issued an NPDES permit to Rocky Flats. The permit set specific limits on the kinds of discharges that Rocky Flats could make, the amounts of specific pollutants that could be discharged and where the discharges could be made. The permit also required Rocky Flats to monitor its discharges, and to report the results to EPA.

RCRA CHARGES

The Information charges Defendant ROCKWELL with four felony violations of the Resource Conservation and Recovery Act, as follows:

COUNT 1

Count 1 charges ROCKWELL with illegal storage of mixed hazardous wastes known as "pondcrete" and "saltcrete," in violation of RCRA interim status regulations.

A. Elements of the Offense.

The elements of this offense, pursuant to 42 U.S.C. § 6928(d)(2)(C), are that:

1. a person
2. knowingly stored
3. one or more hazardous wastes
4. in knowing violation of a material requirement of interim status regulations.

B. Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts:

1. Defendant ROCKWELL is a corporation and therefore, under RCRA, a "person." 42 U.S.C. § 6903(15).

2. "Pondcrete" is a mixture of cement and sludge from a surface impoundment at Rocky Flats known as Solar Evaporation Pond 207A, shaped in large rectangular blocks weighing approximately 1,500 to 1,800 pounds. At all material times, solar pond sludge was treated, and pondcrete was manufactured, in or about Building 788.

3. Pondcrete is a low-level mixed waste exhibiting the hazardous waste characteristic of EP toxicity for cadmium. It is therefore a hazardous waste, pursuant to 42 U.S.C. § 6903(5) and 6 C.C.R. 1007-3, Part 261.

4. "Saltcrete" is mixture of cement, salts and salt brine from liquid waste treatment processes in Building 374, shaped in large rectangular blocks weighing approximately 1,500 to 3,000 pounds. At all material times, salts and salt brine were treated, and saltcrete was manufactured, in or about Building 374.

5. Saltcrete is a low-level mixed waste exhibiting the hazardous waste characteristic of EP toxicity for chromium. It is therefore a hazardous waste, pursuant to 42 U.S.C. § 6903(5) and 6 C.C.R. 1007-3, Part 261.

6. ROCKWELL was required to comply with RCRA interim status storage requirements in storing pondcrete and saltcrete.

7. Colorado Hazardous Waste Regulations, 6 C.C.R. 1007-3, § 265.31 required ROCKWELL to maintain and operate its interim status facilities in such a way as to "minimize the possibility of ... any unplanned sudden or non-sudden release of hazardous wastes or hazardous waste constituents to air, soil, or water which could threaten human health or the environment."

8. 6 C.C.R. 1007-3, § 265.173 required ROCKWELL to handle and store pondcrete and saltcrete containers in a manner that would prevent them from rupturing or leaking.

9. 6 C.C.R. 1007-3 § 265.15(c) required ROCKWELL to "remedy any deterioration or malfunction of equipment or structures ... on a schedule which ensure[d] that the problem [did] not lead to an environmental or human health

hazard. Where a hazard [was] imminent or ha[d] already occurred," ROCKWELL was required to take immediate remedial action.

10. 6 C.C.R. 1007-3, § 265.171 required ROCKWELL, upon discovering that pondcrete and saltcrete containers were not in good condition and had begun to leak, to transfer such wastes to containers in good condition, and to otherwise manage the wastes in compliance with interim status requirements.

11. ROCKWELL was aware and knew of these requirements.

12. On or about June 15-24, September 11-30 and December 7-16, 1987, February 15-24, May 6-25, July 18-27, September 14-23, 1988 and February 6-15, 1989, ROCKWELL knowingly stored approximately 12,000 pondcrete and saltcrete blocks on an outdoor pad known as the 750 Pad.

13. On or about June 6-15, August 1-10 and December 5-14, 1988 and June 1-10, 1989, ROCKWELL knowingly stored approximately 5,000 pondcrete and saltcrete blocks on another outdoor pad known as the 904 Pad.

14. During or about the same period, ROCKWELL knew that a substantial number of pondcrete and saltcrete blocks were not in fact solid. Pondcrete was often a sludge-like or semi-liquid material. Saltcrete was prone to expansion and crystallization.

15. ROCKWELL continued to manufacture pondcrete and saltcrete, and stored these hazardous wastes on the uncovered 750 and 904 Pads, in cardboard boxes with plastic liners, covered with tarps that were not waterproof.

16. ROCKWELL was aware that various pondcrete and saltcrete containers on the 750 and 904 Pads had deteriorated, and failed to remedy their condition.

17. ROCKWELL was aware that pondcrete and saltcrete constituents were leaching and being released from the pondcrete and saltcrete containers onto the 750 and 904 Pads, and failed to remedy this condition.

18. ROCKWELL was also aware that pondcrete and saltcrete constituents were running off the 750 and 904 Pads, and failed to correct this condition.

19. ROCKWELL failed to comply with RCRA interim status storage requirements in storing pondcrete and saltcrete.

COUNTS 2, 3 AND 4

Counts 2, 3 and 4 charge ROCKWELL with illegal treatment and/or storage of mixed hazardous wastes, without a RCRA permit or interim status.

Elements of These Offenses.

The elements of these offenses, pursuant to 42 U.S.C. § 6928(d)(2)(A), are that:

1. a person
2. knowingly treated and/or stored
3. one or more hazardous wastes
4. without a permit or interim status.

COUNT 2

Count 2 charges ROCKWELL with illegal storage of mixed hazardous wastes on the 904 Pad, without a RCRA permit or interim status.

Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts:

1. Defendant ROCKWELL is a corporation and therefore, under RCRA, a "person." 42 U.S.C. § 6903(15).

2. "Pondcrete" is a mixture of cement and sludge from a surface impoundment at Rocky Flats known as Solar Evaporation Pond 207A, shaped in large rectangular blocks weighing approximately 1,500 to 1,800 pounds. At all material times, solar pond sludge was treated, and pondcrete was manufactured, in or about Building 788.

3. Pondcrete is a low-level mixed waste exhibiting the

hazardous waste characteristic of EP toxicity for cadmium. It is therefore a hazardous waste, pursuant to 42 U.S.C. § 6903(5) and 6 C.C.R. 1007-3, Part 261.

4. "Saltcrete" is a mixture of cement, salts and salt brine from liquid waste treatment processes in Building 374, shaped in large rectangular blocks weighing approximately 1,500 to 3,000 pounds. At all material times, salts and salt brine were treated, and saltcrete was manufactured, in or about Building 374.

5. Saltcrete is a low-level mixed waste exhibiting the hazardous waste characteristic of EP toxicity for chromium. It is therefore a hazardous waste, pursuant to 42 U.S.C. § 6903(5) and 6 C.C.R. 1007-3, Part 261.

6. Storage of saltcrete and pondcrete on the 904 Pad required a RCRA permit or interim status.

7. ROCKWELL was aware and knew of this requirement.

8. On or about October 5-9, November 16-20 and December 14-18, 1987, and January 18-22, February 22-26, March 21-25, April 18-22 and May 16-20, 1988, ROCKWELL knowingly stored approximately 5,000 pondcrete and saltcrete blocks on the 904 Pad.

9. The 904 Pad did not have a RCA permit or interim status to treat or store hazardous wastes.

***

CLEAN WATER CHARGES

The Information charges Defendant ROCKWELL with one felony violation of the Clean Water Act and five misdemeanor violations. The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts common to the CWA charges:

1. Defendant ROCKWELL is a corporation and therefore, under the CWA, a "person." 33 U.S.C. § 1362(5).

2. North Walnut Creek (including the A-series ponds), South Walnut Creek (including the B-series ponds) and

Woman Creek (including the C-series ponds) are tributaries to "waters of the United States," including Great Western Reservoir, Standley Lake and the South Platte River, and are therefore waters of the United States. 33 U.S.C. § 1362(7).

3. At all material times, Rocky Flats was an industrial facility which discharged to waters of the United States, and was required to have an NPDES permit concerning its operations.

4. On November 26, 1984, EPA issued an NPDES permit to Rocky Flats, pursuant to 33 U.S.C. § 1342. This permit established various conditions and limitations implementing the CWA, including 33 U.S.C. §§ 1311 and 1317.

COUNT 5

Count 5 charges Defendant ROCKWELL with negligently violating conditions and limitations in Rocky Flats' NPDES permit by discharging and releasing non-sanitary industrial wastes (including toxic and hazardous substances) to Rocky Flats' sewage treatment plant.

A. Elements of the Offense.

The elements of this offense, pursuant to 33 U.S.C. § 1319(c)(1)(A), are that:

1. a person
2. operating under an NPDES permit issued pursuant to 33 U.S.C. § 1342 and implementing §§ 1311 and 1317,
3. negligently violated a condition or limitation in such permit implementing such sections.

B. Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts:

1. ROCKWELL is a person.

2. At all material times, ROCKWELL operated Rocky Flats under an NPDES permit dated November 26, 1984,

which was issued pursuant to 33 U.S.C. § 1342 and established conditions and limitations implementing §§ 1311 and 1317.

3. The NPDES permit, Part II, Section A (Management Requirements), Paragraph 1 (Change in Discharge) required that all discharges authorized by the permit be consistent with its terms and conditions. ROCKWELL was required to report to the EPA all new, different or increased discharges of pollutants. Any new, different or increased discharge of pollutants not authorized by the permit violated the permit.

4. The NPDES permit, Part III (Other Requirements, Management Practices Plan), required ROCKWELL to maintain, implement and follow a Management Practices Plan to prevent or minimize the potential for releasing significant amounts of toxic or hazardous substances from Rocky Flats to waters of the United States.

5. The NPDES permit, Part II, Section A (Management Requirements), Paragraph 3 (Facilities Operation), required ROCKWELL to "at all times maintain in good working order and operate as efficiently as possible all treatment or control facilities installed or used [at Rocky Flats] to achieve compliance with the terms and conditions of [the] permit."

6. ROCKWELL was aware and knew of these requirements.

7. Rocky Flats' sewage treatment plant (consisting primarily of Building 995) was intended to receive and treat only sanitary waste. It was also allowed to receive uncontaminated cooling tower blowdown and steam condensate. The sewage treatment plant was not designed to receive and treat industrial or hazardous wastes, and did not have a RCRA or other permit to do so.

8. On or about August 10-19 and November 12-21, 1987, and March 7-16, April 11-20, May 9-18 and November 9-18, 1988, ROCKWELL negligently discharged and released non-sanitary industrial wastes (including toxic and

hazardous substances) to Rocky Flats' sewage treatment plant, including ignitable and corrosive hazardous wastes (D001, D002), beryllium dust (P015), wastewater treatment sludges (F006, F019), spent halogenated and non-halogenated solvents (F001, F002, F003, F004 and F005), acetone (U022), methylene chloride (U080) and 2-butanone (U002), as well as various metal-bearing waste streams described by ROCKWELL in its RCRA Part A permit applications, on the basis of its process knowledge, as "EP toxic" for silver (D011), cadmium (D006), chromium (D007) and mercury (D009).

9. ROCKWELL negligently failed to report to EPA the discharge and release of these pollutants, which were not authorized by Rocky Flats' NPDES permit.

10. ROCKWELL's Management Practices Plan negligently failed to prevent or minimize the release of toxic and hazardous substances to the sewage treatment plant.

11. ROCKWELL negligently failed to maintain and operate as efficiently as possible all treatment or control facilities necessary to achieve compliance with Rocky Flats' NPDES permit. There was no regular program to monitor wastes being sent to the sewage treatment plant, and only limited monitoring at the treatment plant itself.

12. Rocky Flats' sewage treatment plant was not designed to treat industrial or hazardous wastes, and the unreported discharge of industrial wastes to the sewage treatment plant impaired the plant's performance.

13. Effluent from the sewage treatment plant was generally discharged to the B-3 pond, where it was either discharged through Outfall No. 001 to the B-4 and B-5 ponds or spray irrigated.

COUNTS 6, 7 AND 8

Counts 6, 7 and 8 charge Defendant ROCKWELL with negligently violating Rocky Flats' NPDES permit by discharging water from the B-3 pond which exceeded the permit limits for five-day Biological Oxygen Demand ("BOD-5") and/or fecal coliform, in March, April and May

1988.

A. Elements of These Offenses.

The elements of these offenses, pursuant to 33 U.S.C. § 1319(c)(1)(A), are that:

1. a person
2. operating under an NPDES permit issued pursuant to 33 U.S.C. § 1342 and implementing §§ 1311 and 1317,
3. negligently violated a condition or limitation in such permit implementing such sections.

B. Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts common to Counts 6, 7 and 8:

1. ROCKWELL is a person.

2. BOD-5 and fecal coliform limits are used to determine the adequacy of wastewater treatment. Measurements of BOD-5 and fecal coliform above a determined level indicate that a wastewater has not been treated to the desired level.

3. At all material times, Rocky Flats' NPDES permit contained an effluent limitation implementing 33 U.S.C. § 1311 which required that discharges from the B-3 pond (Outfall No. 001), on a thirty-day average basis, not exceed a BOD-5 limit of ten milligrams per liter.

4. At all material times, Rocky Flats' NPDES permit also required that discharges from the B-3 pond (Outfall No. 001), on a thirty-day average basis, not exceed a fecal coliform limit of 200 organisms per 100 milliliters.

5. ROCKWELL was aware and knew of these requirements.

6. The discharge of industrial wastes (including toxic and hazardous substances) to Rocky Flats' sewage treatment plant and ROCKWELL's inadequate disposal of accumulated sewage sludge impaired the plant's ability to meet the terms and conditions of Rocky Flats' NPDES

permit.

7. ROCKWELL was aware and knew of these conditions.

COUNT 6

Count 6 charges that ROCKWELL negligently violated the BOD-5 limit in Rocky Flats' NPDES permit in March 1988.

Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts:

1. During March 1988, ROCKWELL discharged water from the B-3 pond (Outfall No. 001).

2. On or about March 1, 15 and 30, 1988, ROCKWELL negligently violated the BOD-5 limit in Rocky Flats' NPDES permit.

3. The thirty-day average for BOD-5 was 21.3 milligrams per liter, which exceeded the permit limit.

COUNT 7

Count 7 charges that ROCKWELL negligently violated the BOD-5 and fecal coliform limits in Rocky Flats' NPDES permit in April 1988.

Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts:

1. During April 1988, ROCKWELL discharged water from the B-3 pond (Outfall No. 001).

2. On or about April 1, 8, 12, 16, 20 and 30, 1988, ROCKWELL negligently violated the BOD-5 and fecal coliform limits in Rocky Flats' NPDES permit.

3. The thirty-day average for BOD-5 was more than 27 milligrams per liter, which exceeded the permit limit.

4. The thirty-day average for fecal coliform was 312

organisms per 100 milliliters, which also exceeded the permit limit.

COUNT 8

Count 8 charges that ROCKWELL negligently violated the BOD-5 limit in Rocky Flats' NPDES permit in May 1988.

Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts:

1. During May 1988, ROCKWELL discharged water from the B-3 pond (Outfall No. 001).

2. On or about May 1, 15 and 30, 1988, ROCKWELL negligently violated the BOD-5 limit in Rocky Flats' NPDES permit.

3. The thirty-day average for BOD-5 was more than 11 milligrams per liter, which exceeded the permit limit.

COUNT 9

Count 9 charges Defendant ROCKWELL with knowingly violating conditions and limitations in Rocky Flats' NPDES permit, by "spray irrigating" water from Pond B-3 contrary to good engineering practices and in such a manner as to bypass Rocky Flats facilities which were necessary to maintain compliance with the plant's NPDES permit.

A. Elements of the Offense.

The elements of this offense, pursuant to 33 U.S.C. § 1319(c)(2)(A), are that:

1. a person
2. operating under an NPDES permit issued pursuant to 33 U.S.C. § 1342 and implementing §§ 1311 and 1317,
3. knowingly violated a condition or limitation in such permit implementing such sections.

B. Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts:

1. ROCKWELL is a person.

2. At all material times, ROCKWELL operated Rocky Flats under an NPDES permit dated November 26, 1984.

3. The NPDES permit, Part I, Section A, Paragraph 1 (Effluent Limitations – Outfall No. 001, Discharge from Pond B-3) required ROCKWELL to spray irrigate in "accordance with good engineering practices."

4. The NPDES permit, Part II, Section A (Management Requirements), Paragraph 5 (Bypassing) and Part III (Other Requirements, Bypass of Treatment Facilities) prohibited ROCKWELL from bypassing any Rocky Flats facilities necessary to maintain compliance with the permit's terms and conditions.

5. ROCKWELL was aware and knew of these requirements.

6. At all material times, ROCKWELL practiced spray irrigation to dispose of water from the B-3 pond, which received treated effluent from the sewage treatment plant, contaminated groundwater and plant runoff. This water was sprayed at the East Spray Field.

7. On or about May 18, June 19, July 9, 10 and 22, August 4, November 15 and December 4, 8, 9 and 25, 1987, January 4, March 2, April 22, May 19-20, November 14 and December 2, 9, 15 and 27, 1988, and January 7, February 1, 2, 8, 13, 20 and 25, March 4, 9, 28 and 30, April 11 and 21, May 10, 25 and 31 and June 5, 15 and 23, 1989, ROCKWELL knowingly operated the East Spray Field in violation of good engineering practices, in that ROCKWELL (a) spray irrigated more effluent from Pond B-3 than the East Spray Field had capacity to properly dispose of by evaporation and/or infiltration; (b) spray irrigated during times when the spray fields were saturated, during sub-freezing temperatures, at night and when snow and ice were on the

ground; and (c) spray irrigated over and adjacent to the "East Trenches."

8. The East Trenches are a group of old waste disposal sites at Rocky Flats located east of the main plant, on the north and south sides of the East Access Road. The disposal sites contain approximately 275,000 pounds of uranium-contaminated sewage sludge, 300 flattened uranium-contaminated drums, various plutonium-contaminated debris and volatile organic compounds, including 1-1-dichloroethane, carbon tetrachloride and trichloroethane.

9 ROCKWELL knowingly violated good engineering practices by irrigating over the East Trenches until April 1987, and thereafter irrigating adjacent to the East Trenches, which sent substantial volumes of water into the waste disposal area.

10. ROCKWELL was aware and otherwise knew that its spray irrigation practices caused substantial runoff into the North Walnut Creek drainage (including the A-4 pond), the South Walnut Creek drainage (including the B-4 and B-5 ponds) and the Woman Creek drainage (including the C-2 pond).

11. By these practices, ROCKWELL bypassed Rocky Flats facilities necessary to maintain compliance with the plant's NPDES permit, in that effluent from Pond B-3, by means of spray irrigation and runoff into the other ponds and drainages, bypassed the permitted discharge point from Pond B-3 to the B-4 pond (Outfall No. 001), and was not controlled or monitored at that location.

12. Spray irrigation was practiced in part to avoid violations at Outfall No. 001 which would have occurred if Outfall No. 001 had not been bypassed.

COUNT 10

Count 10 charges that ROCKWELL negligently violated Rocky Flats' NPDES permit in February and March 1989, by allowing a chromic acid spill to reach Rocky Flats' sewage treatment plant and the B-3 pond, spray irrigating the chrome-contaminated wastewater at the Easy

Spray Field and bypassing facilities necessary to maintain compliance with Rocky Flats' NPDES permit.

The offense charged in Count 10, pursuant to 33 U.S.C. § 1319(c)(1)(A), includes the following elements:

A. Elements of the Offense.

1. That a person
2. operating under an NPDES permit issued pursuant to 33 U.S.C. § 1342 and implementing §§ 1311 and 1317,
3. negligently violated a condition or limitation in such permit implementing such sections.

B. Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts:

1. ROCKWELL is a person.

2. At all material times, ROCKWELL operated Rocky Flats under an NPDES permit dated November 26, 1984, which was issued pursuant to 33 U.S.C. § 1342 and established conditions and limitations implementing §§ 1311 and 1317.

3. Rocky Flats' NPDES permit required ROCKWELL to maintain, implement and follow a Management Practices Plan which would prevent or minimize the potential release of toxic and hazardous substances to waters of the United States. ROCKWELL was also required to maintain all of Rocky Flats' treatment and control facilities in good working order and to operate them at all times as efficiently as possible.

4. Rocky Flats' NPDES permit required ROCKWELL to spray irrigate in accordance with good engineering practices, and prohibited ROCKWELL from bypassing any facilities necessary to maintain compliance with the permit's terms and conditions.

5. ROCKWELL was aware and knew of these requirements.

6. On February 23-24, 1989, ROCKWELL negligently failed to prevent the discharge of significant amounts of chromic acid from Building 444 to the sewage treatment plant and the B-3 pond.

7. Chromic acid (containing hexavalent chrome) is a toxic and hazardous substance.

8. ROCKWELL negligently failed to maintain and implement adequate spill detection, control and containment procedures to prevent the chromic acid spill from entering the environment, in that ROCKWELL (a) failed to maintain spill detection and monitoring capability either upstream or at the sewage treatment plant; (b) failed to maintain spill containment capacity in the B-1 and B-2 ponds (or elsewhere), contrary to ROCKWELL's Management Practices Plan; and (c) failed to terminate spray irrigation of the contaminated wastewater from the B-3 pond.

9. On or about February 24-28 and March 2-3, 1989, ROCKWELL negligently spray irrigated the chrome-contaminated wastewater at the East Spray Field, contrary to good engineering practices. In running off the spray fields to the A-4, B-4, B-5 and C-2 ponds, the contaminated wastewater bypassed Outfall No. 001 at Pond B-3 and violated the permit.

Respectfully submitted this March 26, 1992.

U.S. DEPARTMENT OF JUSTICE

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ATTORNEYS FOR PLAINTIFF UNITED STATES OF AMERICA

PLEA AGREEMENT

THIS PLEA AGREEMENT, dated March 26, 1992, is entered into by the United States Department of Justice and Rockwell International Corporation ("Rockwell"), concerning the criminal investigation at the Rocky Flats Nuclear Weapons Plant ("Rocky Flats") near Denver, Colorado, as follows:

1. Pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C), Rockwell will plead guilty to ten criminal charges involving violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq., and the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 et seq., as set forth in the attached charging document. In return, the United States will not bring other environmental criminal charges (or environmentally-related conspiracy, fraud or false statement criminal charges) against Rockwell or its present or former officers, directors or employees, as to all such environmental and environmentally-related matters concerning Rocky Flats which are presently known to the Department of Justice on the date of this agreement.

2. The charges specific in Paragraph 1 may be brought by indictment or information, and, in the event they are brought by information, Rockwell will waive indictment. All pleadings (including sentencing memoranda) will be consistent with such charges and this agreement.

3. The United States and Rockwell agree, pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C), that a specific sentence is the appropriate disposition of this case. In connection with the disposition outlined in Paragraph 1, Rockwell, at the time of sentencing, will pay total criminal fines of $18.5 million (except as provided in Paragraph 4). All monies paid by Rockwell in disposing of the charges outlined in Paragraph 1 shall be considered and otherwise characterized as criminal fines.

4. Contemporaneous with this agreement, Rockwell has also entered into a settlement with the State of Colorado (the "State Settlement"), and will pay the State of Colorado

$2 million. The United States has considered the State Settlement as a significant and material factor in entering this agreement, in terms of the total dollars being paid. The United States agrees that $2 million of the $18.5 million in criminal fines will be remitted if Rockwell, at the time of sentencing, establishes that it has paid $2 million to the State, pursuant to the State Settlement.

5. In connection with this disposition, the United States agrees that, as to all environmental matters at Rocky Flats which are presently known to the Department of Justice or the Environmental Protection Agency ("EPA") on the date of this agreement, the United States covenants not to sue or take administrative action against Rockwell for civil damages, penalties or other monetary relief based upon alleged violations of RCRA, the CWA, § 103 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9603, the Clean Air Act, 42 U.S.C. §§ 7401 et seq., or the Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq.

This covenant does not encompass (or preclude) (a) claims for recovery of response costs, natural resource damages or injunctive relief brought pursuant to RCRA, CERCLA or other authority, or for civil or administrative penalties arising in connection with such relief or a consent decree or administrative order mandating such relief; (b) the ongoing civil or administrative investigation of possible violations of 40 C.F.R. Part 761 concerning polychlorinated biphenyls ("PCBs") at Rocky Flats, including, without limitation, Building 707; or (c) the issues raised in United States of America, ex rel., and James S. Stone v. Rockwell International Corporation, Civil Action No. 89-C-1154 (D. Colo.) ("Stone"). After an independent review, the Department of Justice-Civil Division has determined to file a notice in Stone declining to intervene.

6. Rockwell will not seek to recover, pursuant to indemnification provisions in Rockwell's contracts with the U.S. Department of Energy ("DOE") or otherwise, and will

not recover from DOE, the criminal fines (or any portion thereof) paid by Rockwell in connection with this disposition, as outlined in Paragraphs 3 and 4, whether paid as criminal fines or as payment to the State of Colorado, pursuant to the State Settlement.

7. Except as provided in Paragraph 8, Rockwell will not seek to recover, pursuant to indemnification provisions in Rockwell's contracts with DOE or otherwise, and will not recover from DOE, the attorneys' fees and costs incurred by Rockwell in defending or preparing to defend the Rocky Flats criminal investigation and prosecution (including this disposition and sentencing), concerning the following subjects: (a) the manufacture, storage, treatment, disposal or other management of pondcrete and saltcrete; (b) the use of the 207 solar ponds to receive, treat or store hazardous or mixed wastes; (c) the manufacture, storage, treatment or other management of vacuum filter sludge; (d) the operation and management of the sewage treatment plant (including its influent and effluent); (e) spray irrigation; (f) Rocky Flats' violation of the biological oxygen demand and fecal coliform limits in its NPDES permit; and/or (g) the cromic acid spill in February-March 1989.

8. As authorized by 41 U.S.C. § 256(c) and 10 C.F.R. § 970.3102-20(c), Rockwell may seek to recover from DOE (and subject to DOE's review and approval in accordance with the relevant contract(s) and applicable law and regulations): (a) attorneys' fees and costs incurred by Rockwell (on behalf of the corporation) prior to January 1, 1990 (but not thereafter); (b) attorneys' fees and costs incurred by Rockwell in providing legal representation to past and present Rockwell employees; and (c) costs concerning a computer system which is also used in Rocky Flats-related civil litigation.

9. Except as provided in Paragraphs 6, 7 and 8, the effect and application of various indemnification provisions in Rockwell's contracts with DOE are matters for DOE's determination. While the Department of Justice will not, on

its own, initiate action to invalidate such provisions to the extent they are interpreted by DOE to allow indemnification for environmental or related tort liability to third-parties, the Department of Justice may represent DOE in any litigation concerning these matters. For purposes of the indemnification provisions in Rockwell's contracts with DOE, nothing in this agreement shall be construed as an admission by Rockwell, or a determination by the Department of Justice, of "willful misconduct or lack of good faith" by Rockwell's "managerial personnel," as such terms are used or defined in Contract DE-AC04-76DP03533, but DOE shall be informed of this disposition and shall not be precluded, concerning these matters, from considering the same.

10. In connection with this disposition, the Department of Justice will make the following statements at an appropriate time:

a. Based on information presently known to the Department of Justice, the conduct to which Rockwell has pleaded guilty did not and has not resulted in substantial physiological harm, or the imminent threat of substantial physiological harm, to members of the public residing and working outside Rocky Flats' boundaries.

b. The investigation has not revealed that hazardous or mixed wastes were burned in the Building 771 incinerator during the period October 1988 to January 1989, or, at any time, in the Building 776 fluidized bed incinerator.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[FILED]
[UNITED STATES DISTRICT COURT]
[DENVER COLORADO]
[DEC 15 1992]
[JAMES R. MANSPEAKER]
[CLERK]

Case No. 89-C-1154

UNITED STATES OF AMERICA
ex rel. James S. Stone,

Plaintiff,

v.

ROCKWELL INTERNATIONAL
CORPORATION,

Defendant.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT UNDER RULE 12(b)(1) FOR LACK OF SUBJECT MATTER JURISDICTION

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Defendant Rockwell International Corporation ("Rockwell") respectfully submits this brief in support of its Motion To Dismiss Plaintiff's Complaint Under Rule 12(b)(l) for Lack of Subject Matter Jurisdiction ("Motion").

I. FACTS

In July 1989, relator James S. Stone ("Stone") filed a complaint against Rockwell under the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729-33, as amended in 1986 (the "FCA").[1]

In his complaint Stone alleged that Rockwell violated the FCA by concealing from the United States Government its violations of various environmental, health and safety statutes and regulations (the "ES&H provisions") in its operations at the Rocky Flats Plant, and by falsely representing to the Government that it was in compliance with those provisions. (Complaint ¶¶ 14, 15, 19 & 24.) Stone further alleged that Rockwell concealed its ES&H violations from the Government, and made false statements to the Government concerning its compliance with ES&H provisions, to obtain payments from the Government in connection with Rockwell's operation of the Rocky Flats Plant. (*Id.* ¶¶ 19 & 24.) Rockwell believes Stone has no facts to support these allegations of false statements and

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[1] Rockwell contends that Stone's claims are governed by the pre-amendment, rather than the post-amendment, FCA—a contention supported by the only appellate case on point. *See United States v. Murphy*, 937 F.2d 1032, 1036-38 (6th Cir. 1991). Under the pre-amendment FCA, Stone's claims are jurisdictionally barred if they are "based upon evidence or information in the possession of the United States ... at the time such suit was brought." *See* 31 U.S.C. § 3730(b)(4) (1985), *amended by* 31 U.S.C. § 3730(e)(4) (1986). Stone admits that his claims are based upon information in the Government's possession at the time this suit was brought. *See* Attachments A-3 & A-4 (Interrogatory No. 1(k) and Stone's response thereto). Stone's claims are therefore barred under the jurisdictional provisions of the pre-amendment FCA. Rockwell assumes *arguendo* solely for purposes of this motion that Stone's claims are governed by the post-amendment Act.

concealments, and has accordingly filed a motion under Fed. R. Civ. P. 56 seeking judgment in its favor as a matter of law. For purposes of the present motion only, however, Rockwell assumes *arguendo* that all of the allegations set forth above are true.

Stone also alleged in his complaint that he was the "original source" of the allegations set forth therein. (Complaint ¶ 8.) Stone made this allegation in accordance with 31 U.S.C. § 3730(e)(4), which provides in pertinent part:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations ... in a criminal ... hearing ... or from the news media, unless ... the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who [*inter alia*] has direct and independent knowledge of the information on which the allegations are based ....

Set forth below are undisputed facts bearing on the issues raised by these two elements of section 3730(e)(4), *i.e.*, (1) whether this action is based upon the public disclosure of allegations in a criminal hearing or in the news media, and (2) whether Stone had direct and independent knowledge of the information on which the allegations are based.

A. Public Disclosure of Allegations

On June 6, 1989—one month before Stone commenced this action—the Federal Bureau of Investigation filed an Application and Affidavit for Search Warrant (the "Search Warrant Affidavit") in *In re Search of Rocky Flats Plant*, Magistrate's Case No. 89-730M (D. Colo.). The Search Warrant Affidavit, the pertinent pages of which are attached to Rockwell's Motion as Attachment A-1, stated that it was based upon an investigation conducted by the FBI, the Environmental Protection Agency ("EPA"), the

Department of Justice and the U.S. Attorney's Office for the District of Colorado. (Attachment A-1, ¶ 1.4.) The affidavit alleged there was probable cause to believe that Rockwell:

- "knowingly and falsely stated Rocky Flats' compliance with environmental laws and regulations, and concealed Rocky Flats' 'serious contamination'" (*id.* ¶ 2.10);
- "falsely certified in November 1985 that Rocky Flats was 'in compliance with all applicable [RCRA] groundwater monitoring [requirements]'" (*id.* ¶ 2.11);
- "provided DOE with erroneous and incomplete reports on environmental, health and safety matters" (*id.* ¶ 2.12);
- "failed to report two discharges from Rocky Flats in November 1988 into creeks crossing the Rocky Flats property and leading to metropolitan Denver drinking water supplies," and "failed to disclose at least three illegal discharges in December 1988 ... from the plant's sewage treatment facility" (*id.* ¶ 2.13);
- "made false statements to or concealed material facts from the EPA concerning discharges from Rocky Flats to 'navigable waters'" (*id.* ¶ 9.25); and
- "certified that the solar ponds at Rocky Flats ... were 'in compliance with all applicable groundwater monitoring and financial requirements stated or referred to in [RCRA],'" when "the certifications were completely at odds with information known to Rocky Flats officials" (*id.* ¶ 10.15).

The affidavit further alleged that "[t]here is probable cause to believe that ... false statements and concealment of material facts have occurred, in violation of ... 18 U.S.C. § 1001." (*Id.* ¶ 5.55.) That statute imposes criminal liability upon a person who, "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up ... a material

fact, or makes any false, fictitious or fraudulent statements or representations."

On June 9, 1989, in response to motions filed by the Government and the *Rocky Mountain News*, Magistrate Judge Hilbert Schauer issued an order unsealing the Search Warrant Affidavit. (*See* Attachment A-2.) There followed numerous news reports concerning the allegations of false statements and concealments by Rockwell. For example, the June 10, 1989 *Denver Post* stated:

> Investigators ... say Rocky Flats officials ... falsified documents to hide environmental crimes.
>
> * * *
>
> Another group of allegations concerns false statements and concealment to "keep the public from knowing just how really bad the site is," said the affidavit ....
>
> 'There is probable cause to believe that Rockwell and (Energy Department) officials have knowingly and falsely stated Rocky Flats compliance with environmental laws and regulations, and concealed Rocky Flats' serious contamination," the affidavit said.
>
> Also, the affidavit said, "false statements and concealment of material facts have occurred" at the plant.
>
> The investigation also is looking into whether performance bonuses were paid to Rockwell based on falsified evaluations.

(Attachment A-10, p. 12.) The June 10, 1992 *Rocky Mountain News* and *Boulder Daily Camera* similarly described the affidavit's allegations of false statements and concealments by Rockwell. (*Id.* pp. 13-17.) And the June 21-27, 1989 *Westword* stated:

> A joint EPA and CDH inspection in 1983 established that Rockwell ... had been storing and

> disposing hazardous waste without the required permit since at least 1981. Plant managers had insisted a permit wasn't necessary because the waste fell below the minimum amount requiring a permit, and none of it was stored longer than ninety days. The inspection revealed both claims were false—and Rockwell knew it.
>
> * * *
>
> As early as 1985, regulators knew the plant was illegally fouling the groundwater, and that Rockwell had knowingly misrepresented its protection measures.

(*Id.* p. 18) There were also numerous news reports on June 7-10, 1989 concerning the FBI's investigation into, *inter alia*, alleged false statements and concealments by Rockwell, including articles in the *Boulder Daily Camera*, *The Denver Post*, *The New York Times*, the *Wall Street Journal*, the *Los Angeles Times*, the *Arvarda Sentinal*, the *Westminster Sentinal*, the *Broomfield Enterprise* and the *Austin (Texas) American-Statesman*. (*See id.* pp. 1-11.)

B. Direct and Independent Knowledge of Information

On July 5, 1989—one month after the public disclosure in the Search Warrant Affidavit and the news media of alleged false statements and concealments by Rockwell—Stone filed his FCA complaint alleging false statements and concealments by Rockwell. Stone's complaint did not specify a single instance in which Rockwell had engaged in such conduct. Instead, it alleged generally—as had the Search Warrant Affidavit and news media—that Rockwell "knowingly concealed ... its numerous and continuous violations" of the ES&H provisions from the Government, and that the Government, "unaware of the nature and extent of the wrongful acts committed by Rockwell, made ... payments ... in reliance on false ... statements made by Rockwell." (Complaint ¶¶ 19 & 24.)

In December 1991 Rockwell submitted interrogatories to Stone concerning his allegation that he was the "original source" of these allegations (*id.* ¶ 8), *i.e.*, that he had "direct and independent knowledge" of false statements and concealments by Rockwell. In response to Rockwell's request that Stone present his evidence of such false statements or concealments (*see* Attachment A-5, Interrogatory Nos. 1(*l*)-(o)), Stone stated:

> Stone does not know the identities of specific persons who may have either affirmatively misrepresented to the government that Rockwell was in compliance with the Environmental and Safety Laws and Agreements which it had in fact violated, or concealed such violations from the government. Also, Stone does not know the identities of specific documents which contain affirmative misrepresentations or, when taken as a whole with other submissions by Rockwell, reflect concealments of those violations.

(Attachment A-8, p. 2.) Stone then added the following statement purporting to be responsive to Rockwell's request for evidence supporting his allegations of false statements and concealments by Rockwell:

> [U]nder the terms of the contracts between Rockwell and the U.S. Government [the "Agreements"] ... Rockwell was required to comply with ... statutes and regulations governing the environment, health and safety. Furthermore, Modification M111 to the base contract ... requires that Rockwell affirmatively certify such compliance. Accordingly, all conduct by Rockwell in seeking to receive funds from the government ... when Rockwell knew that it was in violation of applicable environmental, safety and health laws, constitutes knowing misrepresentation and concealment of the actual facts from the government.

(*Id.*) Stone did not have a copy of the Agreements, or of Modification M111 to those Agreements, when he commenced this action. Moreover, Stone admitted in his deposition that he had no personal knowledge whatever concerning Rockwell's requests for funds from the Government:

> Q. Do you have any personal knowledge or evidence regarding Rockwell's presentation of claims or solicitations for payments or receipt of payments from the government?
>
> A. No.
>
> Q. You don't have any paperwork that Rockwell might have submitted or that the government reviewed or anything like that?
>
> A. No.

(Attachment A-9 p. 123, ll. 14-22.) Stone also admitted in his deposition that, even assuming Modification M111 required Rockwell to certify its compliance with ES&H provisions, he was not aware of a single document in which Rockwell falsely certified that it was in compliance:

> Q. Can you point me, Mr. Stone, or can you produce to me or show me where to find any specific documents where Rockwell falsely certified that it was in compliance when it was not?
>
> A. No.

(*Id.* p. 113, II. 2-7.) In fact, neither Modification M111 nor any other provision of the Agreements required Rockwell to certify that it was in compliance with the ES&H provisions, and Rockwell did not so certify. (*See* Attachment A-11 ¶ 4.)

II. ARGUMENT

Under section 3730(e)(4) of the False Claims Act, this Court lacks jurisdiction over Stone's *qui tam* action if:

(1) the action is "based upon the public disclosure of allegations in ... a criminal hearing ... or from the news media"; and (2) Stone did not have "direct and independent knowledge of the information on which the allegations are based." The satisfaction of section 3730(e)(4) is an issue of subject matter jurisdiction. *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548, 551 (10th Cir. 1992). A number of well-established principles govern the Court's resolution of this issue.

First, since federal courts are courts of limited jurisdiction, this Court must presume that no jurisdiction exists absent a showing of proof by Stone. *Id.*; *see also Penteco Corp. Ltd. Partnership 1985A v. Union Gas System, Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991) (party invoking federal jurisdiction has burden of proof).

Second, the Court, and not a jury, must decide whether subject matter jurisdiction exists. *See, e.g., Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981) ("Jurisdictional issues are for the court—not a jury—to decide, whether they hinge on legal or factual determinations."); 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 234-35 (2d ed. 1990).

Third, the Court must decide the issue of subject matter jurisdiction before it addresses the merits of Stone's claims. *See, e.g., Wang v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992) ("We must examine whether any of [the *qui tam* plaintiffs] claims are blocked by the jurisdictional bar of section 3730(e)(4) *before* we can consider any other question.") (emphasis in original); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988) ("A motion under Fed.R.Civ.P. 12(b)(1) questioning subject matter jurisdiction must be considered before other challenges since the court must find jurisdiction before determining the validity of a claim.")

Finally, in this Motion Rockwell attacks the existence of subject matter jurisdiction as a matter of fact, rather than as a matter of pleadings. The importance of this distinction

is described in *Mortensen v. First Federal Savings and Loan Ass'n*, 549 F.2d 884 (3d Cir. 1977):

> [W]e must emphasize a crucial distinction, often overlooked, between 12(b)(l) motions that attack the complaint on its face and 12(b)(1) motions that attack the existence of subject matter jurisdiction in fact, quite apart from any pleadings. The facial attack does offer similar safeguards to the plaintiff: the court must consider the allegations of the complaint as true. The factual attack, however, differs greatly for here the trial court may proceed as it never could under 12(b)(6) or Fed.R.Civ.P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, *no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.*

Id. at 891 (emphasis added). *See also Thigpen v. United States*, 800 F.2d 393, 396 (4th Cir. 1986) ("[A] court asked to dismiss for lack of jurisdiction may resolve factual disputes to determine the proper disposition of the motion. * * * Were it otherwise, a party could bootstrap jurisdiction simply by the use of artful pleading. The nature of jurisdiction requires that courts establish in fact, rather than assume blindly, their power to hear a dispute.") Because Rockwell is attacking the existence of subject matter jurisdiction as a factual matter, this Court "may gather evidence on the question of jurisdiction by affidavits or otherwise in an effort to determine the facts as they exist." *Koch Industries*, 971 F.2d at 551 n.1, *quoting Schramm v. Oakes*, 352 F.2d 143, 149 (10th Cir. 1965).

A. *Allegations of False Statements and Concealments by Rockwell Were Publicly Disclosed in a Criminal Hearing and in the News Media Before Stone Commenced This Action.*

It is undisputed that the allegations of false statements and concealments by Rockwell were publicly disclosed in a criminal hearing and in the news media before Stone commenced this action. Indeed, the news media itself recognized this fact. The November 14, 1990 *Boulder Daily Camera* stated: "Most of the claims in Rocky Flats whistleblower Jim Stone's $1 billion lawsuit against Rockwell aren't new. They've been the subject of news articles, public hearings, admissions or lawsuits." (Attachment A-10 p. 20.)

Both the Search Warrant Affidavit, which was made available to the public pursuant to court order in a criminal proceeding,[2] and the news media, including *The Denver Post*, the *Rocky Mountain News*, the *Boulder Daily Camera*, the *Arvarda Sentinal*, the *Westminster Sentinal*, the *Broomfield Enterprise*, *The New York Times*, the *Wall Street Journal*, the *Los Angeles Times* and the *Austin (Texas) American-Statesman*, disclosed allegations of false statements and concealments by Rockwell before Stone commenced this action. *See* Attachment A-10. The disclosure of such "allegations," as distinguished from information or evidence supporting the allegations, is all that section 3730(e)(4)(A) requires. *See Wang*, 975 F.2d at

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[2] The public release of the affidavit pursuant to Magistrate Schauer's order is unquestionably a "public disclosure" in a "criminal hearing," within the meaning of section 3730(e)(4)(A). *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149, 1156 (3d Cir. 1991) ("*Stinson*") (section 3730(e)(4)(A) "should be interpreted broadly to include allegations and information disclosed in connection with . . . criminal . . . litigation"). *See also Black's Law Dictionary*, at 721 (6th ed. 1990) (the term "hearing" includes "whatever takes place before magistrates clothed in judicial functions and sitting without a jury at any stage of the proceedings subsequent to its inception").

1418 ("[The FCA] bars suits based on publicly disclosed 'allegations or transactions,' not information. * * * The Act appears to be invoking the common logical distinction between an assertion and its proof. * * * An allegation can be made public, even if its proof remains hidden.")

Even if Stone based the allegations of false statements and concealments set forth in his complaint on information he developed independently of the Search Warrant Affidavit and the news media—and he emphatically did not, for the reasons discussed below—the "public disclosure" prong of section 3730(e)(4) would still be satisfied. As the Second Circuit declared in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992) ("*Doe*"):

> The relator's final argument is that his complaint is not *based upon* allegations or transactions that were publicly disclosed in a manner provided in the statute. * * * The relator's argument misses the point. The allegations in his complaint are the same as those that had been publicly disclosed prior to the filing of the *qui tam* suit. Public disclosure of the allegations divests district courts of jurisdiction over *qui tam* suits, regardless of where the relator obtained his information. * * * Were it otherwise, parasitic actions would flourish.

Finally, even if Stone's *qui tam* action were only partly supported by the allegations disclosed in the Search Warrant Affidavit and the news media, the "public disclosure" prong of section 3730(e)(4) would be satisfied. As the Tenth Circuit declared in *Koch Industries*:

> [Section] 3730(e)(4)(A) states a *qui tam* action may be barred only if the action is "based upon" the public disclosure of "allegations or transactions." * * * [¶] As a matter of common usage, the phrase "based upon" is properly understood to mean "supported by." In this context, an FCA *qui tam* action even partly based upon publicly disclosed

> allegations or transactions is nonetheless "based upon" such allegations or transactions. Congress chose not to insert the adverb "solely," and we cannot, because to do so would dramatically alter the statute's plain meaning.
>
> * * *
>
> [W]e conclude that a plaintiff whose *qui tam* action is based in any part upon publicly disclosed allegations or transactions is subject to the "original source" jurisdictional requirement.

971 F.2d at 552 & 553.

Because Stone's *qui tam* action is based at least in part upon allegations publicly disclosed in the Search Warrant Affidavit and the news media, the Court lacks subject matter jurisdiction over this action unless Stone had "direct and independent knowledge" of the information on which his allegations of false statements and concealments by Rockwell are based.

B. Stone Lacked Direct and Independent Knowledge of Information on Which His Allegations of False Statements and Concealments by Rockwell Are Based.

In *Koch Industries*, the Tenth Circuit stated:

> Congress never intended a *qui tam* plaintiff to benefit in whole or in part upon publicly disclosed allegations or transactions *unless* that plaintiff can demonstrate he was an original source as defined by statute.
>
> * * *
>
> "Original source" is expressly defined as "[A]n individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided

> the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B).
>
> Two jurisdictional requirements are evident from the plain language of this provision: 1) a *qui tam* plaintiff must have direct and independent knowledge of the information on which the allegations are based; and 2) a *qui tam* plaintiff must have voluntarily provided such information to the government prior to filing suit.

Id. at 553 (emphasis in original). In *Doe*, the Second Circuit summarized the history of the False Claims Act leading up to the enactment of section 3730(e)(4)(B)'s "original source" requirement:

> As originally enacted, the FCA did not require that relators bring any new information to the government's attention; rather individuals were able to bring suit based solely on information already uncovered in the government's investigation and, then, share in the award. *See, e.g., United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943). *Qui tam* suits by individuals seeking quick cash without assisting in exposing the fraud were aptly characterized by Attorney General Biddle, in 1943, as "parasitic" actions.
>
> *Marcus* represents the high-water mark for parasitic *qui tam* actions. There, the relator's civil complaint appeared to be copied from a criminal indictment. The Supreme Court held that nothing in the FCA barred the relator's action even if his knowledge of the fraud was solely a product of the government's investigation. Reacting to *Marcus*, Congress immediately amended the *qui tam* provisions of the FCA to bar all *qui tam* actions based on information that the government already possessed.

960 F.2d at 321 (some citations omitted).

The court in *Doe* noted that the 1943 FCA amendments had the effect of eviscerating *qui tam* actions, because most *qui tam* plaintiffs reported defendants' fraudulent conduct to the government before filing suit under the FCA. In such cases the *qui tam* plaintiff's FCA claim was deemed to be jurisdictionally barred because the Government already possessed the information on which the claim was based, notwithstanding that the Government had acquired its knowledge only through the *qui tam* plaintiff's disclosure. *Id.* The court in *Doe* stated that Congress accordingly further amended the FCA's *qui tam* provisions in 1986 in an attempt to "strike a balance between encouraging private citizens to expose fraud and *avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud.*" *Id.* (emphasis added).

Thus, while the 1986 amendments to the FCA's *qui tam* provisions were intended to encourage private citizens to expose fraud, they were also intended to ensure that no *qui tam* plaintiff could bring a parasitic suit like *Marcus*. *See, e.g., Stinson*, 944 F.2d at 1163 ("the drafters of the 1986 amendments * * * did not want to restore the opportunity to bring 'parasitic' suits like that encountered in *Marcus*"); *Doe*, 960 F.2d at 322 (Congress drafted the 1986 amendments to the FCA's *qui tam* provisions "to avoid the blatant opportunism embodied in cases like *Marcus*"); Brody, "Recent Developments in the Area of 'Qui Tam,'" *Fed. Bar & News J.* 592, 595 (Dec. 1990) ("One of the principal goals of barring *qui tam* actions based on public disclosures is to prevent the 'parasitical' or 'copycat' lawsuit."); Oparil, "The Coming Impact of the Amended False Claims Act," 22 *Akron L. Rev.* 525, 549 (1989) ("Clearly, the purpose of the [1986] amendment was to retain the 1943 Amendment's bias against parasitic lawsuits."). As one court has noted, "[t]he primary problem in *Marcus* was that the relator had acted on information

developed *by the government* in its own investigations, and therefore provided the government with no new information. * * * [S]uch a situation creates 'unseemly races for the opportunity of profiting from the government's investigations.'" *Stinson*, 944 F.2d at 1163 (emphasis in original) (*quoting Marcus*, 317 U.S. at 547).

Although the FCA's *qui tam* provisions were plainly intended to prevent *qui tam* plaintiffs from profiting from information developed by the Government in its own investigations, Stone has admitted that his FCA claim is based almost entirely on such information. Rockwell's Interrogatory No. l(a) asked Stone to set forth the facts constituting Rockwell's alleged misconduct at Rocky Flats. In his original response to that interrogatory, Stone stated that those facts included:

> 1. Any and all facts ... discovered ... as a result of the joint investigation of the [EPA, FBI and DOJ] ...which produced the 121 page Search Warrant ...;
>
> 2. Any and all facts stated in or referred to in the Search Warrant, or any documents or other things seized thereunder...;
>
> 3. Any and all facts discovered, presented, testified to, or otherwise obtained through or in connection with the U.S. Grand Jury (No. 89-2) ...;
>
> 4. Any and all facts ... alleged in ... all indictments or charges of violation of law made by or as a result of the Grand Jury ....

(Attachment A-6, ¶¶ 1-4.) Lest there remain any doubt that Stone was basing his FCA claim on information developed by the Government in its own investigations, Stone proclaimed that his suit was also based on information discovered as a result of investigations conducted by: (1) DOE's Criticality Safety Assessment Team (*id.* ¶ 5); (2) DOE's Inspector General (*id.* ¶ 7); (3) the Colorado Department of Health (*id.* ¶ 8); (4) the House Subcommittee

on Legislation and National Security (*id.* ¶ 15); and (5) the House Committee on Transportation and Hazardous Materials (*id.* ¶ 16).

When Rockwell pressed Stone for more specific information about Rockwell's alleged wrongdoing, Stone resorted to the technique used by the *qui tam* plaintiff in *Marcus*: wholesale copying of allegations made by the Government as a result of its own investigations. Stone's technique differed from Marcus' principally with respect to the documents from which he plagiarized: While Marcus copied the allegations from a criminal indictment, Stone copied the allegations from the Search Warrant Affidavit and from the Government's Sentencing Memorandum in *United States v. Rockwell*, Case No. 92-CR-107 (D. Colo.). As Attachment A-4 to Rockwell's Motion reveals, Stone's Third Supplemental Response to Interrogatory No. l(a) (Attachment A-7) contains 14 allegations that are substantively identical to allegations contained in the Search Warrant Affidavit, and 14 allegations that are substantively identical to allegations contained in the Government's Sentencing Memorandum. The following is but one of these 28 instances of plagiarism by Stone:

Search Warrant Affidavit	*Stone's Discovery Response*
The resubmitted Part A application estimated that Rocky Flats generated, stored or otherwise accumulated approximately 13,000 pounds of hazardous wastes on an annual basis ... Information submitted by or obtained from DOE and Rockwell show that Rocky Flats in fact generated or accumulated at least 25,227 pounds of RCRA hazardous wastes in 1984 (almost twice the amount estimated in August 1983) ...(Search Warrant Affidavit ¶¶ 5.10 & 5.11.)	The resubmitted Part A application estimated RFP generated, stored or otherwise accumulated approximately 13,000 pounds of hazardous wastes at RFP. Information obtained by EPA showed, in fact, that RFP generated or accumulated at least 25,227 pounds of RCRA hazardous waste in 1984, nearly twice the sum estimated in 1983. (Stone's Third Supplemental Response ¶ 1(b)(11).)

Stone's FCA action is precisely the kind of "copycat" or "parasitical" lawsuit that *Marcus* embodied, and that the amended FCA's *qui tam* provisions were intended to prevent. Stone will nevertheless argue that this case is distinguishable from *Marcus* because he, unlike Marcus, was an insider who blew the whistle on the defendant's fraud against the Government. This contention is both legally and factually baseless.

The FCA's *qui tam* provisions plainly require that the *qui tam* plaintiff have direct and independent knowledge *of the defendant's fraud*. See, for example:

- *Senate Report concerning 1986 FCA Amendments*: The purpose of the FCA is "to encourage any individual *knowing of Government fraud* to bring that information forward." S. Rep.

No. 345, 99th Cong., 2d Sess. 2, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267.

- *House reporting concerning 1986 FCA Amendments*: "The purpose of the *qui tam* provisions of the False Claims Act is to encourage private individuals *who are aware of fraud being perpetrated against the Government* to bring such information forward." H.R. Rep. No. 660, 99th Cong., 2d Sess. 23 (1986).

- *Stinson*: "One theme recurring through the legislative history in 1985 is the intent to encourage persons *with first-hand knowledge of fraudulent misconduct* to report fraud." 944 F.2d at 1154.

- *Doe*: "By allowing *qui tam* relators to share in any recovery, the FCA encourages those *with knowledge of fraud against the government* to bring that information to the fore." 960 F.2d at 321.

(Emphases added throughout.)

Stone concurs in this interpretation of the amended FCA's *qui tam* provisions. *See* Complaint ¶ 3 ("the 1986 amendments [to the FCA] were intended by Congress to create incentives to persons, *who are aware of ... false or fraudulent practices* used against the Government, to disclose such information"). Stone has also made it clear that, while a portion of his case involves Rockwell's alleged ES&H violations, the "gist" of his case involves Rockwell's alleged concealment of those violations from the Government, and false statements to the Government that no such violations had occurred:

> Unquestionably, a portion of Plaintiffs' case involves ... violations of state and federal health, safety, and environmental laws and regulations. However, *the gist of Plaintiffs' complaint is ... that Rockwell knowingly concealed [the ES&H violations] from the Government, and falsely represented that it was*

> *in compliance with legal and contractual requirements*, so as to induce the Government to continue to make payments in connection with the operation of Rocky Flats Plant.

(Stone's Response to Motion To Dismiss, p. 7 (emphasis added; citations omitted).)

Thus, to avoid section 3730(e)(4)'s jurisdictional bar Stone must prove that when he filed his FCA claim he had "direct and independent knowledge" of the "gist" of that claim, *i.e.*, false statements and concealments by Rockwell. As the Third Circuit held in *Stinson*: "[T]he relator must possess *substantive information about the particular fraud*, rather than merely background information which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation." 944 F.2d at 1160 (emphasis added).

In fact, Stone has admitted that he not only lacks the "direct and independent" knowledge of false statements/concealments required by the FCA; he lacks *any* knowledge of such misconduct. Specifically, Stone has admitted that he cannot identify: (1) a single Rockwell employee who falsely told the Government that Rockwell was in compliance with the ES&H provisions; (2) a single Rockwell employee who concealed ES&H violations from the Government; (3) a single document which falsely stated that Rockwell was in compliance with the ES&H provisions; or (4) a single document indicating that Rockwell concealed ES&H violations from the Government. Stone has also admitted that has no personal knowledge regarding Rockwell's presentation to the Government of claims for payment for the operation of Rocky Flats. *See* Stone's interrogatory and deposition answers quoted at pages 5-7. Under these circumstances Stone cannot possibly satisfy the FCA's "direct and independent knowledge" test. *Cf. Koch Industries*, 971 F.2d at 554 (*qui tam* plaintiff failed "direct and independent knowledge" test where its information was "weak, informal and strikingly redundant").

III. CONCLUSION

A Court is without subject matter jurisdiction over a *qui tam* plaintiff's FCA claim where, as here, (1) that claim is based on publicly disclosed allegations of false statements/concealments, and (2) the plaintiff lacks direct and independent knowledge of information supporting those allegations. Rockwell accordingly requests that the Court enter an order dismissing this case for lack of subject matter jurisdiction.

Dated: December 15, 1992.

WILLIAMS, YOULE & KOENIGS, P.C.

By: /s/ Christopher J. Koenigs
Michael A. Williams
Christopher J. Koenigs
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Denver, Colorado 80202
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Attorneys for Defendant
Rockwell International Corporation

United States District Court

DISTRICT OF COLORADO

In the Matter of the Search of * * *	
The Rocky Flats Plant U.S. Department of Energy Rockwell International Corporation Highway 93 Golden, Colorado 80402	APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT CASE NUMBER

I Jon S. Lipsky being duly sworn depose and say:

I am a(n) Special Agent, Federal Bureau of Investigation and have reason to believe that ☐ on the person of or ☒ on the property or premises known as * * *

The Rocky Flats Plant, U.S. Department of Energy, Rockwell International Corporation, Highway 93, Golden, Colorado 80402, (as more particularly described in Attachment 1 incorporated here by reference)

in the State and District of Colorado there is now concealed a certain person or property, namely * * *

the property described on Attachment 2 (incorporated here by reference) which is

evidence or the means or instrumentalities of, or the fruits or other results of, criminal violations of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(a) and 1319(c), and 18 U.S.C. §§ 1001 and 2.

The facts to support a finding of Probable Cause are set forth in Attachment C, incorporated here by reference.

Continued on the attached	☒ Yes	☐ No

sheet and made a part hereof.		/s/ [Name Illegible] Signature of Affiant
Sworn to before me, and subscribed in my presence _____ Date	at	Denver, Colorado City and State
_____ Name and Title of Judicial Officer		/s/ [Name Illegible] Signature of Judicial Officer

ATTACHMENT 1

ATTACHMENT 3

1. INTRODUCTION

1.1. Your affiant is a Special Agent with the Federal Bureau of Investigation ("FBI") assigned at Denver, Colorado. I have been an FBI agent since February, 1984. The FBI derives its general investigatory jurisdiction from Titles 18 and 28 of the United States Code. Title 28, U.S.C. § 535 gives the FBI jurisdiction to investigate alleged crimes involving United States Government officers and employees, and 42 U.S.C. § 2271(b) gives the FBI primary jurisdiction concerning the investigation of alleged crimes committed at United States Department of Energy ("DOE") facilities. The FBI has concurrent jurisdiction with the United States Environmental Protection Agency ("EPA") to investigate the alleged violation of federal environmental laws.

1.2. I have attended three different training sessions concerning the investigation and prosecution of environmental crimes, for a total of 13 days of intensive course work, lectures and seminars on the Resource Conservation and Recovery Act ("RCRA"), the Federal Water Pollution Control Act (popularly known as the "Clean Water Act" or "CWA"), and other federal environmental laws. I have been the lead investigator or a substantial participant in at least 13 investigations of environmental crimes. I have been a lecturer or speaker at three FBI training conferences concerning investigation of environmental crimes. I have received five commendations for my work in this area.

1.3. The other lead investigator concerning this matter is William F. Smith. Mr. Smith is a Special Agent with EPA's Office of Criminal Investigations ("OCI") and is also assigned at Denver, Colorado. Agent Smith has been an OCI Special Agent since November 1984, and also has seven years' experience in other federal law enforcement. In addition to his extensive training concerning the investigation of environmental crimes, Agent Smith has

been involved in numerous environmental investigations, has taught at five FBI training conferences concerning environmental crimes and has supervised other OCI agents in investigating such cases.

1.4. This Application is based upon the investigation conducted to date by the FBI and the EPA, including Special Agent Smith and EPA's National Enforcement Investigations Center, together with the United States Department of Justice and the United States Attorney's Office for the District of Colorado. The following statements are based upon a review of numerous studies, reports and documents from federal, state and local governments and agencies, including the EPA and the Colorado Department of Health ("CDH"), as well as materials submitted to various agencies by, or otherwise obtained from or concerning DOE and Rockwell International Corporation ("Rockwell"). The following statements are also based upon my own physical observations and those of others, as well as interviews conducted with various people. All legal analysis is based upon the advice and assistance of the Department of Justice and the United States Attorney's Office. All referenced exhibits are incorporated as part of this Application.

* * *

False Statements and Concealment

2.10. Consistent with their efforts to keep the public from knowing "just how really bad the site is," July 1986 DOE Memorandum (emphasis added), there is probable cause to believe that Rockwell and DOE officials have knowingly and falsely stated Rocky Flats' compliance with environmental laws and regulations, and concealed Rocky Flats' "serious contamination." Id.

2.11. While DOE concluded in December 1988 that groundwater contamination at Rocky Flats was the greatest single environmental hazard at all of DOE's nuclear weapons facilities, there is probable cause to believe that Rockwell and DOE officials falsely certified in November 1985 that Rocky Flats was "in compliance with all applicable

[RCRA] groundwater monitoring [requirements]." In fact, and contrary to such certification, various Rockwell and DOE officials were aware of serious contamination and were informed that the monitoring system was deficient, did not comply with RCRA, and produced data of limited (or questionable) validity.

2.12. In or about May 1987, DOE awarded Rockwell a performance bonus of approximately $8.6 million, based on Rockwell's alleged "excellent" management at Rocky Flats. DOE officials rated the health and safety programs at Rocky Flats "very good" and said that the plant's programs to manage radioactive and toxic wastes were "excellent," despite other DOE findings that some of Rocky Flats' waste facilities were "patently 'illegal,'" that Rockwell had significant problems in controlling radioactive contamination at the plant and that Rockwell provided DOE with erroneous and incomplete reports on environmental, health and safety matters. In addition, three separate DOE inspections at Rocky Flats since 1986 have noted serious health and safety problems and severely criticized Rocky Flats' management.

2.13. In December 1988, Rocky Flats officials failed to report two discharges from Rocky Flats in November 1988 into creeks crossing the Rocky Flats property and leading to metropolitan Denver drinking water supplies, which contained chemical pollutants not authorized by Rocky Flats' CWA permit. Rocky Flats also failed to disclose at least three illegal discharges in December 1988 (¶ 2.8) from the plant's sewage treatment facility.

2.14. There is also probable cause to believe that Rocky Flats operated the plant's Building 771 incinerator in December 1988 to treat or dispose of hazardous or mixed wastes, contrary to public statements that Building 771 was shutdown from October 1988 to late January 1989.

2.15. Such false statements and concealment are apparent violations of various environmental statutes, such

as 42 U.S.C. § 6928(d)(3), as well as 18 U.S.C. § 1001.

2.16. In sum, there is probable cause to believe that environmental and other crimes have been committed at Rocky Flats and that evidence of such crimes is located there.

* * *

5.22. As part of Rocky Flats' November 8, 1985 submission, DOE's Albert E. Whiteman and Rockwell's J. E. Dorr also certified that Rocky Flats' groundwater monitoring system complied with RCRA's requirements. As discussed in Part 10, this certification was false, in violation of 18 U.S.C. § 1001.

* * *

regulatory personnel to conduct the necessary permit analysis. In its response dated May 2, 1989, DOE indicated its willingness to request a continuance "until such time (as) CDH [can] enhance Q-cleared staff and review, to its satisfaction, information relative to the issuance of a final permit."

5.55. In sum, the investigation to date shows a substantial history of RCRA issues and alleged violations at Rocky Flats, and establishes DOE's and Rockwell's clear knowledge of federal environmental law and regulation. Rocky Flats does not have a RCRA permit and several enforcement proceedings are ongoing. There is probable cause to believe that hazardous and mixed wastes have been illegally treated, stored and disposed of at Rocky Flats, in violation of 42 U.S.C. § 6928(d)(2); that DOE and Rockwell have repeatedly failed to provide EPA and CDH with complete and accurate waste information necessary to proper regulation; that wastes have been improperly mixed, contrary to 42 U.S.C. § 6928(d)(2); and that false statements and concealment of material facts have occurred, in violation of 42 U.S.C. § 6928(d)(3) and 18 U.S.C. § 1001. In conjunction with ¶¶ 1.18 – 1.22, there is probable cause to believe that evidence of such crimes is located at Rocky Flats, in Buildings 111, 115, 122, 123, 706 and 776, as well as

the Wind Systems Building.

9.25 There is probable cause to believe that DOE and/or Rockwell have made false statements to or concealed material facts from the EPA concerning discharges from Rocky Flats to "navigable waters", in violation of 18 U.S.C. § 1001, and has criminally violated the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c), by negligently or knowingly discharging pollutants, into Walnut and Woman Creeks since at least 1987, without a permit or in violation of Rocky Flats' permit conditions.

* * *

10.15. On November 8, 1985, DOE submitted a Part B RCRA permit application to EPA, concerning Rocky Flats' status and operation as a RCRA hazardous waste facility. Both DOE's Acting Area Manager, Albert E. Whiteman, and Rockwell's Vice President and General Manager, J. E. Dorr, certified "under penalty of law" that they had examined the application, that they were familiar with its information and that such information was "true, accurate and complete." Mr. Whiteman and Mr. Dorr certified that the solar ponds at Rocky Flats known as Ponds 207A, 207B and 207C were "in compliance with all applicable groundwater monitoring and financial requirements stated or referred to in (RCRA), as amended." The certifications were footnoted as follows: "The present solar pond groundwater monitoring system meets the spirit of RCRA, i.e. detection of groundwater degradation. Although initially designed for radiological purposes, the groundwater monitoring program was modified in 1981 to be <u>essentially equivalent with the RCRA program</u> ...." (Emphasis added.) In fact, the certifications were completely at odds with information known to Rocky Flats' officials.

* * *

10.35. There is probable cause to believe that hazardous wastes have been illegally treated, stored and disposed of at Rocky Flats, in violation of material interim status groundwater monitoring requirements, contrary to 42 U.S.C. § 6928(d)(2), and that false statements have been made concerning the same, involving matters within EPA jurisdiction, in violation of 42 U.S.C. § 6928(d)(3) and 18 U.S.C. § 1001. There is also probable cause to believe that evidence of such crimes is located at Rocky Flats, in Buildings 111, 115, 122, 123, 706 and 776, as well as the Wind Systems Building, where relevant documents are likely to be maintained.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-C-1154

UNITED STATES OF AMERICA
ex rel. James S. Stone,

Plaintiff,

v.

ROCKWELL INTERNATIONAL
CORPORATION,

Defendant.

PLAINTIFF JAMES S. STONE'S AMENDED RESPONSES TO INTERROGATORY NOS. 1(d), (1), (m), (n) AND (o), 5, 6, 7, 11(a), 12-16, 21(d), AND 23 (a), (b) AND (d) OF DEFENDANT'S FIRST INTERROGATORIES

Plaintiff James S. Stone ("Stone"), by his attorneys Hartley David Alley; Buchanan, Gray, Purvis & Schuetze; McDermott, Hansen & Reilly; and Breit, Best, Richman and Bosch, P.C., hereby submits the following amended responses to Interrogatory Nos. 1(d), (l), (m), (n), and (o) ,5, 6, 7, 11(a), 12-16, 21(d) and 23 (a), (b) and(d) of Defendant's First Interrogatories:

Interrogatory No. 1 (d), (l), (m), (n), and (o):

d. Identify all Rockwell Employees who you contend had actual knowledge of the facts constituting the violation at the time Rockwell submitted any claim to the Government that you contend was false;

l. State whether you contend that Rockwell affirmatively misrepresented to the Government that it was in compliance with the Environmental and Safety Laws (including regulations thereunder)

and Agreement that you contend were violated by virtue of such facts;

m. If your answer to subpart (l) above is other than an unqualified negative, identify (in accordance with Instruction Nos. 9-10 above) each document or oral communication in which Rockwell made such misrepresentation to the Government;

n. State whether you contend that Rockwell concealed from the Government the facts constituting the violation of the Environmental and Safety Laws and Agreements;

o. If your answer to subpart (n) above is other than an unqualified negative; (i) identify all Rockwell Employees who to your knowledge concealed the violation from the Government, and (ii) identify all documents supporting your contention that Rockwell concealed the violation from the Government;

Amended Response to Interrogatory Nos. 1(d), (l), (m), (n) and (o):

The persons identified in the "Individuals" column of Attachments 1 through 4 of Plaintiff's Consolidated Answers and Responses to Discovery are persons whom Stone believes had actual knowledge of some facts constituting the violation at the time Rockwell submitted false claims to the government. Concerning Instruction No. 8, neither Stone nor his attorneys know the current address, telephone number, or employer of the individuals listed in Plaintiff's Consolidated Answers and Responses to Discovery.

Stone does not know the identities of specific persons who may have either affirmatively misrepresented to the government that Rockwell was in compliance with the Environmental and Safety Laws and Agreements which it had in fact violated, or concealed such violations from the government. Also, Stone does not know the identities of specific documents which contain affirmative misrepresentations or, when taken as a whole with other

submissions by Rockwell, reflect concealment of these violations. However, under the terms of the contracts between Rockwell and the U.S. Government relative to the operation of RFP (and Modifications thereto) previously identified in the "Nexus" column of Attachments 1-4 to Plaintiff's Consolidated Answers and Responses to Discovery, Rockwell was required to comply with all laws and regulations of the United States, which include laws, statutes and regulations governing the environment, health and safety. Furthermore, Modification 111 to the base contract, previously identified in the "Nexus" column of Attachments 1-4 to Plaintiff's Consolidated Answers and Responses to Discovery, requires that Rockwell affirmatively certify such compliance. Accordingly, all conduct by Rockwell in seeking to receive funds from the government in payment of fixed fees, base fees and award fees, as well as GAO payments, under the respective agreements relative to the operation of RFP, when Rockwell knew that it was in violation of applicable environmental, safety and health laws, constitutes knowing misrepresentation and concealment of the actual facts from the government.

Interrogatory No. 5:

With respect to your allegations, set forth in paragraphs 15 and 20 of the Complaint, that Rockwell conspired with others to (a) defraud the Government in order to obtain approval of a false or fraudulent claim, and (b) conceal the true nature and extent of its

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-C-1154
THE DEPOSITION OF JAMES S. STONE
VOLUME I

November 2, 1992
UNITED STATES OF AMERICA, ex rel. JAMES S. STONE,
Plaintiff,
-vs-
ROCKWELL INTERNATIONAL CORPORATION,
Defendant.

PURSUANT TO NOTICE, the deposition of JAMES S. STONE, VOLUME I, was taken on behalf of the Defendant, pursuant to the pertinent Federal Rules of Civil Procedure, at 9:15 a.m., this date, at 1200 Seventeenth Street, Suite 1420, Denver, Colorado, before Cornella Van Esso, Notary Public and Court Reporter, State of Colorado.

* * *

[110]

Q: How long did it take you to do that?
A: About three days.
Q: Are you planning on testifying as an expert witness in this litigation? I presume you're not.
A: I don't know.
MR. BREIT: He is not.
MR. MCMAHON: And just for the record, just so that we're clear on the specificity, John, that you gave me with respect to modification 111, the page numbers and subsections and sub-paragraphs, that's the kind of specificity that would be very helpful, that we would have liked to have had in all of this.
MR. BREIT: We'll try to do that. We're in the process, and we will deliver to you so there's no question as to what

our contentions are.

MR. McMAHON: Okay.

MR. BREIT: Okay.

Q: (By Mr. McMahon) Mr. Stone, you started to talk about the cooling tower, the conversation over the cooling tower, and the incident with Ron Foster. Aside from that, were there any other [111] matters that you know of where Rockwell affirmatively represented to DOE that Rockwell was in compliance with environmental, safety, and health provisions, when it was not?

A: I can't remember any.

Q: Okay. Other than that—and you don't even have any documents relating to the cooling tower incident, right, that indicate any misrepresentations of concealment?

MR. BREIT: I'm going to object. It's not part of the case, and it doesn't matter.

MR. McMAHON: Let me withdraw it.

Q: (By Mr. McMahon) Other than the cooling tower incident, you don't have any documents evidencing concealing or misrepresenting that Rockwell was in compliance when it was not; is that right?

A: That would require a legal conclusion, I believe.

Q: As far as factually, you don't know of any?

A: I don't know.

Q: Okay. Now, you started to say something, and I gave you a label of passive non-disclosure, in other words, failing affirmatively to come forward and make disclosure to the government of [112] violations. Do you understand my use of that terminology?

A: Yes.

Q: Is it your contention in this lawsuit that what Rockwell has really done is that it has failed to come forward and tell the government that it was in violation of various environmental, safety, and health provisions?

A: That requires a legal interpretation, and I was not privy to that activity.

MR. BREIT: Tom, I can tell you, in part, our position is precisely that, that Rockwell, while knowingly was in violation of statutes, ordinances, and regulations, accepted money to which it was not entitled due to those violations, without disclosing the breach of the contract or those regulations, orders, and statutes.

MR. McMAHON: Does that constitute a false claim?

MR. BREIT: Yes, in part.

MR. McMAHON: And, in part, there were, according to, as I understand the Amended Discovery Responses, there were false certifications? Is that the Plaintiff's theory?

MR. BREIT: Yes. [113]

MR. McMAHON: Okay.

Q: (By Mr. McMahon) Can you point me, Mr. Stone, or can you produce to me or show me where to find any specific documents where Rockwell falsely certified that it was in compliance when it was not?

A: No.

Q: Now, you understand that Rockwell was on essentially a year-to-year contract with the Department of Energy?

A: No.

Q: Okay, What is your understanding of Rockwell's contract with DOE?

A: They had a five-year contract. They're on their second.

Q: I'm sorry?

A: They were on their second five-year contract when I went to work for them.

Q: All right. Do you have an understanding as to how often Rockwell was evaluated by the Department of Energy?

A: Yes.

Q: Okay. And what is that understanding?

A: I believe it was semi-annually.

Q: So, roughly every six months? [114]

A: Yes.

Q: Okay. And do you have an understanding of how that evaluation impacted Rockwell's compensation?

A: Yes.

Q: And what is that understanding?

A: That we were graded—that Rockwell was graded on a number of parameters, the performance of a number of parameters, that DOE submitted and evaluated Rockwell's performance on.

Q: Okay. And by performance areas, are you talking about functional performance areas?

A: Yes.

Q: Are you familiar with that terminology?

A: Yes.

Q: Okay. Okay. Do you have an understanding as to how many functional performance areas there were in any given evaluation period?

A: I believe there might have been twenty parameters, categories, that they would be evaluated on, and—

Q: And they'd get a score in each category?

MR. BREIT: If you know.

A: I don't know.

Q: (By Mr. McMahon) Well, was it your [115] understanding, as a general matter, that the higher score Rockwell got, the greater amount it would get in the way of remuneration from the government?

A: Yes.

Q: On page 8 of Exhibit 39, actually pages 8 to 10, of your Amended Response to Interrogatory Number 15, you set forth a number of functional performance areas with respect to various modifications of the contract covering various time periods, most of which appear to be one-year time periods, and then showing for each of those performance areas a certain percentage.

Do you see that?

A: Yes.

Q: And it is your contention, I take it, that the

violations of environmental, safety, and health provisions that you contend Rockwell engaged in impacted these various functional performance areas during these time periods?

A: Yes.

Q: Okay. Is it your contention that, if Rockwell engaged in one environ-

* * *

[122]

in causing to be presented."

You know, I think, and it's been my personal supposition anyway, that what is really at issue here is Rockwell presenting, not causing somebody else to present, false claims, but we would like that pinned down.

MR. BREIT: That's fair. To my knowledge, qualified by discovery to date, it is our position that it is Rockwell who has presented as opposed to causing some other party to present.

MR. McMAHON: I think we can have some sort of a stipulated agreement. If I find something that causes you to expand your view as to that, then we reserve the right to inquire further.

MR. BREIT: Sure. Absolutely. I'm trying to be as—give you as much insight as I can into our position. reserving only as to matters that may come up in further discovery.

MR. McMAHON: Okay.

MR. BREIT: We're not ready to state substantially for that purpose; and, in fact, this sort of deposition is very helpful that you have, quote, any of our representations. All it takes is a phone call and letter to you, as promptly and succinctly as possible, without the necessity of [123] filing Motions and engaging in litigation over those sorts of things.

Q: (By Mr. McMahon) Along that line then, I just—let's direct our attention to subparagraph B, Mr. Stone. I take it then that what you're contending there is that

Rockwell knowingly made or used false records to obtain approval for payment of false claims? You're not saying that Rockwell caused somebody else to make or use false records?

A: I'm saying that Rockwell caused it.

Q: Okay. All right. And let me—I can probably shorten this considerably.

Do you have any personal knowledge or evidence regarding Rockwell's presentation of claims or solicitations for payments or receipt of payments from the government?

A: No.

Q: You don't have any paperwork that Rockwell might have submitted or that the government reviewed or anything like that?

A: No.

Q: And do you know who at Rockwell actually submitted paperwork to the government seeking to get Rockwell's claims paid? **[124]**

A: Yes. I used to know his name, but I would have to look at a directory to find it.

Q: Is it somebody who is the treasurer or the comptroller—

A: Yes.

Q: —or somebody like that?

A: Yes.

Q: I presume that the claims you're talking about are the claims for payment every six months or so—

A: Yes.

Q: —during these evaluation periods?

A: Yes.

Q: And as you sit here, you probably don't have the specific dates on which paperwork was submitted or that the claims were paid?

A: No.

Q: Presumably, the claims we're talking about here are the claims made to the Department of Energy—

A: Yes.

Q: —for payment? I think, for clarity on the record, and for the Reporter, I think you have used the term "DOE" a few times. By that you mean D-O-E, the Department [125] of Energy?

A: Yes.

Q: And, presumably, you don't know exactly who at the Department of Energy received paperwork from Rockwell requesting payment, or who actually made payment to Rockwell?

A: I knew his name. It sounds like Brizinski (phonetic). It's a Polish name or something like that.

Q: Let me ask this. Do you know, was this person in the Rocky Flats Area Office of DOE?

A: No. It was Albuquerque.

Q: DOE, Albuquerque?

A: Yes.

Q: Would Rostenkowski sound—

A: Yes.

Q: Ron Rostenkowski?

A: I don't know the first name, but it's Rostenkowski, yeah.

Q: He would be the person to whom the paperwork was submitted, to your understanding?

A: Yes.

Q: And would he make the final determination as to how much Rockwell would get paid?

MR. BREIT: If you know. [126]

A: No.

Q: (By Mr. McMahon) Do you know if that determination was made in Washington?

A: I understood that it was. My impression was that there was a Contracting Officer that made that determination in Albuquerque.

Q: Do you know who that Contracting Officer was?

A: No.

Q: Now, is it your position—what is your position with respect to whether anyone at DOE was aware of any of the

environmental, safety, or health violations that you are alleging in this lawsuit?

A: I have no position on DOE.

Q: You don't know whether they knew or didn't know?

A: Yeah.

Q: You're not saying they didn't know? You're saying "I don't know?"

A: I said I have no position on that. I don't know what they knew.

Q: So, you don't have any evidence one way or the other as to what DOE knew or didn't know?

A: That's right. [127]

Q: Do you have a feeling as to whether DOE knew or didn't know?

MR. BREIT: Well, I'm going to object to "feelings." That's something worse than rank speculation.

MR. McMAHON: I think Mr. Stein stated his position in this regard many times in many forms.

MR. BREIT: I understand, but it doesn't have any legal significance what he feels or speculates or surmises, nor is it relevant or admissible in any legal proceedings.

MR. McMAHON: I think it's reasonably calculated to lead to the discovery of admissible evidence.

MR. BREIT: If you have a feeling or suspicion, you can—

A: I believe the case has been narrowed to the issues in this case, and I have put all the other considerations out of my mind. I don't have any feelings about anything other than the issues that I'm trying to concentrate on and give you as much information as I can that relates to this specific case.

* * *

DAILY CAMERA Wednesday, June 7, 1989

AGENTS PROBE ALLEGATIONS AT ROCKY FLATS

CHARGES INCLUDE VIOLATIONS OF ENVIRONMENTAL LAWS, LYING

By LINDA CORNETT and BILL SCANLON
Camera Staff Writers

DENVER – A team of 75 federal agents, dressed in protective clothing and carrying a federal criminal warrant, moved in on Rocky Flats nuclear weapons plant Tuesday morning to investigate charges that Rocky Flats employees violated environmental laws and lied to cover up the violations.

Investigators from the FBI, Environmental Protection Agency and Department of Justice plan to spend about 10 days, round-the-clock at the nuclear weapons plant south of Boulder collecting documents and samples. They will spend another six months to a year studying the results before deciding what felony charges, if any, are filed.

U.S. Attorney General for Colorado Mike Norton said Tuesday that a federal grand jury will be convened to investigate the same allegations, and Henson Moore, deputy secretary of the Department of Energy which contracts with Rockwell International Corp. to operate the plant, said the DOE [illegible] its own investigation. DOE has promised full cooperation with the investigation, he said. "We take this matter very seriously."

According to the U.S. Department of Justice, the specific allegations include:

- Unpermitted treatment, storage and disposal of hazardous and mixed radioactive and hazardous waste.
- The discharge of pollutants without a permit or in excess of permit limits.

- False certification of federal environmental reporting requirements.
- Concealment of environmental contamination.

At the plant, spokesman Pat Etchart said employees have been told to cooperate with the investigation. The plant will continue to operate.

Federal agents also began a search of DOE offices in Albuquerque, N.M., that supervise Rocky Flats.

The on-site probe and the year-long investigation that led up to it were news to state officials. Gov. Roy Romer and state Health Department Director Tom Vernon were informed at 1 p.m. Tuesday, just a half hour before a scheduled press conference.

Romer said he had been promised a daily update on the investigation and is convinced federal officials will close the plant if they find evidence that it poses a hazard to employees or Colorado citizens.

But, "I sit here today very angry, very angry," the governor said, recalling his much-publicized visits to the plant and his resulting assurances that there was no health threat. "It jars you to the bone to realize the judgments we made in Colorado may have been made on bad information."

Federal officials refused to say what prompted the investigation "to preserve the safety and integrity of our investigative team and their sources," in Norton's words.

However, Norton stressed, "There is no reason at this time to believe the allegations pose any new or different imminent threat to public health or safety."

The state's limited monitoring of the air and ground water around Rocky Flats supports that assurance, Vernon said.

Representatives of citizens groups who have long demanded the shut-down of the plant disagree. "They keep saying there is no threat to the public health, but there always has been and there still is," said Eugene DeMayo, state vice chairman of the Sierra Club.

Norton said Tuesday he will ask a delay on a lawsuit

filed by the Sierra Club June 2 demanding that two incinerators used at the plant to burn plutonium waste and other toxic materials be shut down. DeMayo said the Sierra Club lawsuit should continue.

U.S. Rep. David Skaggs, D-Colo., said the investigation proves that DOE cannot police itself and the large number of investigators descending on the plant indicates a number of employees are suspected.

The Rocky Flats plant, east of Colorado 93 between Boulder and Golden, has a history of problems. In October, the plant's main plutonium reprocessing building was shut for four months after an accident exposed three workers to radioactive contamination. In December, Rockwell paid $47,500 in fines for violating federal laws regulating disposal of toxic chemicals and a DOE report detailed 32 new problems.

In March, state Department of Health officials investigated a toxic spill into the plant's sewage system and tainted water sprayed onto surrounding fields.

DENVER POST Wednesday, June 7, 1989

Federal Agents Raid Rocky Flats

Illegal Storage, Disposal Of Hazardous Waste Alleged

By Thomas Graf and Peter G. Chronis
Denver Post Staff Writers

More than 70 federal agents raided the Rocky Flats nuclear weapons plant yesterday as part of a massive criminal investigation into an alleged coverup of illegal storage and disposal of radioactive and hazardous waste.

The investigation is the largest ever of a U.S. Department of Energy facility, the first criminal probe ever of a nuclear facility, and the latest black mark on Rocky Flats' spotty environmental record.

The probe, which began in secret two years ago, was announced yesterday.

Officials said it may take another six months to a year to complete, and that parts of the plant may have to be shut down during the probe.

The plant, 18 miles northwest of Denver, is operated by Rockwell International Corp.

It makes triggers for nuclear weapons.

Mike Norton, acting U.S. attorney in Denver, said federal authorities are investigating these and other allegations:

That Rocky Flats illegally treated, stored and disposed of hazardous and radioactive wastes;

That it discharged pollutants without permits or in excess of permit limits;

That the plant falsified documents showing compliance with environmental-reporting rules and concealed contamination.

Norton said one allegation is that mixed hazardous and radioactive wastes may have been discharged into creeks flowing through Rocky Flats. He declined to identify the streams.

Several streams cross the Rocky Flats site, including Upper Church Ditch flowing into Upper Church Lake, Walnut Creek flowing into Great Western Reservoir, Woman

Please see FLATS on 7-A

Quick action vowed If health threats found

FLATS from Page 1-A

Creek flowing into Standley Lake, and Rock Creek.

Justice Department officials indicated that the probe was primarily focused on previously reported acts of pollution, rather than new acts waste disposal.

According to a Justice Department statement released yesterday, "No new environmental dangers have been indentified by this investigation. The thrust of our investigation is to determine whether there have been any false statements or concealments."

Agents of the FBI, the Environmental Protection Agency's Office of Criminal Investigations and the DOE's Inspector General office swept onto the 6,500-acre facility at 9 a.m. to search for records and evidence, as well as air, water and soil samples.

Many of the agents wore protective clothing, said Bob Pence, agent in charge of the FBI's Colorado office.

Long search planned

The search will take 10 days, partly because of the need to proceed cautiously in dealing with hazardous-waste materials, officials said.

In Washington, Energy Secretary James D. Watkins told reporters that parts of the plant would be shut down as a result of the investigation.

An Energy Department spokesman, however, said the precise operations and the number of personnel that may be affected has not yet been determined. Local officials

indicated that parts of the plant may have to be shut down as investigating agents seek access to them.

Norton and other federal investigators released only general information about the investigation.

But Norton said that if the probe uncovers any indication of new health or safety threats at Rocky Flats, appropriate state and federal authorities will be notified immediately.

He said it is of "critical importance" to note that the issues are "allegations only." He said speculation about possible indictments or prosecution would be "premature."

Norton's office is overseeing the probe and will present evidence to the federal grand jury in Denver when it concludes.

Pat Etchart, spokesman for Rockwell International, declined to comment on the probe, except to say that plant employees were being "asked to cooperate in any way possible."

The search was conducted simultaneously with one at the DOE's Albuquerque operations office, which oversees Rocky Flats.

Although Norton declined to say what precipitated the probe, a Justice Department source said the investigation didn't result from any "single event, or source, or piece of information. It was a combination of factors." No "whistle blower" was involved, the official said.

U.S. Attorney General Richard Thornburgh, in a statement released in Washington, said the Department of Justice, which normally doesn't reveal continuing investigations, was taking the "highly unusual step" of disclosing the Rocky Flats probe because the search will be "a matter of public record" and also because it is "absolutely essential that the public understand that this investigation does not signal any major new environmental safety or health problem."

About 40 members of Congress, including U.S. Rep. David Skaggs, D-Boulder, were briefed on the probe

yesterday by Watkins. Skaggs said later that the energy secretary revealed few details of the investigation.

"It is unprecedented to have a battalion of FBI agents to descend on a federal facility to conduct an investigation of alleged violations of important environmental laws," Skaggs said. "The only implication that comes out of an action of this scale is that federal authorities were concerned about the destruction of evidence."

Meanwhile, DOE is conducting a separate investigation into the allegations, said Henson Moore, deputy secretary of energy, who arrived at the plant Monday from Washington.

Moore said a 16-member DOE team will conduct an analysis of Rocky Flats operations.

Officials said they would suspend any plant activities that might be made unsafe by the presence of investigators.

Rocky Flats has long been plagued by safety and environmental woes. Safety violations last October led to the closure of the main plutonium reprocessing building for four months. A December report by the DOE listed 32 safety violations and concluded Rocky Flats posed the greatest health risk of all the department's nuclear weapons facilities.

Yet DOE officials more recently have said the plant's operation record is improving. On Jan. 31 of this year, the DOE awarded Rockwell International a five-year, $2.5 billion contract to continue operating Rocky Flats for another five years.

In May, Skaggs and others proposed a congressionally funded study to determine if there is a link between Rocky Flats pollution and cancer cases in the Denver metro area.

At least part of the investigation centers on the use of three plutonium-recovery incinerators at Rocky Flats.

Sierra Club filed suit

In February, the Sierra Club filed a lawsuit against the DOE and Rockwell, claiming the incinerators were operating in violation of state and federal environmental laws.

The U.S. Justice Department yesterday requested a indefinite postponement of the Sierra Club lawsuit, saying that the federal probe "in part covers the very same issues addressed in this lawsuit."

Adam Babich, the Sierra Club attorney in the case, said he may announce today whether the environmental group will challenge the postponement.

Norton said the federal probe has "raised questions about the validity of statements" made by the DOE in response to the Sierra Club lawsuit.

The incinerators targeted in the Sierra Club lawsuit burn waste contaminated with both radioactive plutonium and non-radioactive hazardous waste and attempt to recover plutonium from the exhaust.

Denver Post wire services and staff writers Mark Obmascik and Alan Gottlieb also contributed to this report.

ROMER ANGRY STATE KEPT IN DARK ABOUT PROBE

By The Denver Post

Gov. Roy Romer reacted angrily yesterday when he learned that state officials had been kept in the dark about the federal investigation into the Rocky Flats nuclear weapons plant.

"I am outraged by the possibility that some possible criminal act has occurred at Rocky Flats that may have endangered the population of this area," Romer said. "It jars me to the bone to realize that the judgments we have made in Colorado about Rocky Flats may have been made on bad information."

The governor has been very active in the ongoing debate about where waste from Rocky Flats will be shipped and stored.

Romer said U.S. Attorney Mike Norton told him about the investigation just an hour before announcing the probe during a Denver news conference yesterday afternoon.

Department of Energy officials did promise to give Romer daily briefings on the probe, and the governor said he hopes to learn more about the case in the next two days.

Federal officials didn't discuss yesterday why state officials weren't briefed sooner.

News of the investigation stunned many people other than Romer, including public officials, environmentalists and others interested in the controversial nuclear weapons plant.

"This kind of thing has never happened before," said Jim Bickel, assistant manager of the federal Department of Energy's Albuquerque operations office. "If it's true, it certainly isn't going to help our credibility." Over 70 FBI agents began searching the plant yesterday morning, checking allegations that hazardous waste was treated, stored and disposed of without permits.

They also were looking for evidence that plant management had concealed environmental contamination and falsified federal environmental reports.

Energy Secretary James Watkins reiterated yesterday that he is committed to operating Rocky Flats and other weapons plants "fully in compliance with all pertinent statutes and in such a manner that the primary concern for environment, health and safety of employees and the public is satisfied."

The north Jefferson County plant's day-shift employees were notified over the public address system that an investigation was in progress, said Pat Etchart, a spokesman for plant contractor Rockwell International. Total plant employment is about 6,000.

Plant critics said the investiga-

Please see **REACTION** on 7A

NEW YORK TIMES June 7, 1989
(Washington) C39-06-045

U.S. Begins Criminal Investigation at Nuclear Plant

By DAVID JOHNSTON
Special to The New York Times

WASHINGTON, June 6—The Justice Department today announced a broad criminal investigation into possible violations of Federal environmental laws at the Rocky Flats Plant in Colorado, which processes plutonium for nuclear warheads.

The investigation centers on whether employees faked documents submitted to state and Federal officials showing that the plant was complying with clean air and water laws, and whether employees discharged pollutants without a permit and concealed contamination, department officials said.

There are also specific allegations of illegal treatment, storage and disposal of hazardous and radioactive waste, the officials said.

Records Are Seized

Seventy agents from the Federal Bureau of Investigation as well as investigators from the Energy Department and Environmental Protection Agency began to seize records this morning at Rocky Flats and obtain air, water and soil samples in a search that is expected to take 10 days. Agents also began executing search warrants at the Energy Department's operations office in Albuquerque, N.M., which supervises the Rocky Flats Plant. Government officials did not say whose offices were searched today. Rocky Flats, 18 miles northwest of Denver, is managed by the Rockwell International Corporation under contract to the Energy Department, and the officials said investigators were examining actions of both Government and Rockwell employees. Last year the department identified the plant as

the most environmentally hazardous site in the nuclear weapons industry because toxic chemicals contaminate an underground reservoir and threaten nearby city water supplies.

Adm. James D. Watkins, the Energy Secretary, said tonight that part of the plant would be shut down as a result of the investigation. A department spokesman said the precise operations and the number of employees affected had not been determined.

In a statement, Mr. Watkins said he was suspending "those operations for which safety could be adversely affected by the presence and functioning of the Department of Justice investigating team."

He added: "I have stated repeatedly

Continued on Page B5, Column 4

it is my intention to operate Department of Energy facilities fully in compliance with all pertinent statutes and in such a manner that the primary concern for environment, health and safety of employees and public is satisified."

The plant employs about 5,300 workers.

Representative David E. Skaggs, a Colorado Democrat whose district includes the plant, said Mr. Watkins met with up to 40 members of Congress this afternoon at the Energy Department.

Mr. Watkins said he had named a new manager for the plant and was sending as many as 20 people to the plant to monitor environmental, safety and health matters, Mr. Skaggs said.

"It is unprecedented to have a battalion of F.B.I. agents to descend on a Federal facility to conduct an investigation of alleged violations of important environmental laws," Mr. Skaggs said. "The only implication that comes out of an action of this scale is that Federal authorities were concerned about the destruction of evidence."

The inquiry thrusts the Justice Department into a conflict between the Energy Department and the environmental agency over who should be blamed for the pollution problems and how quickly cleanup should procede. Last year, the Energy Department estimated that the cost of cleaning up pollution dating to development of the atomic bomb in the 1940's would be $100 billion or more.

'Matter of Public Record'

The announcement of the investigation was unusual because Attorney General Dick Thornburgh has in recent days expressed outrage at unauthorized disclosures to news organizations about preliminary investigations of public officials.

Mr. Thornburgh said he was announcing the Rocky Flats inquiry because "the search will be a matter of public record, and, second, I believe it is absolutely essential that the public understand that this investigation does not signal any major new environmental safety or health concern."

A spokesman for Secretary Watkins said the department had agreed to cooperate fully.

Officials said the investigation was limited to Rocky Flats, one of 17 principal nuclear weapons sites in 12 states with important environmental deficiencies.

The Energy Department and Rockwell have been questioned for years about pollution at the 11-square-mile site. Last October the plant was shut for five months after an accident in which three workers were exposed to radioactive contamination. In December, Rockwell paid $47,500 in fines for violating Federal pollution laws that regulate disposal of toxic chemicals.

How did workers dispose of radioactive waste?

Patrick J. Etchart, a spokesman for Rockwell at Rocky Flats, declined to comment on the allegations, except to say

that plant workers had been encouraged to cooperate with Federal agents..

Sending a 'Shock Wave'

Some environmentalists said the investigation was a positive step. "This will send a shock wave through the nuclear weapons complex," said Dan W. Reicher, a lawyer for the Natural Resources Defense Council, which monitors the nuclear industry's adherence to environmental laws. "It will cut to the heart of the problem, which has always been accountability."

WALL STREET JOURNAL June 7,
(los angeles)

Government's Nuclear Weapons Plant Near Denver Is Under Investigation

By PAUL M. BARRETT And BARBARA ROSEWICZ
Staff Reporters of The Wall Street Journal

WASHINGTON -- The Justice Department launched a criminal investigation into possible illegal disposal of radioactive waste and concealment of hazardous contamination at the government's Rocky Flats Nuclear Weapons Plant near Denver.

The investigation of the plant, operated by Rockwell International Corp. under a contract with the Energy Department, "is the first of its kind at a government facility of this type," said Michael Norton, the U.S. attorney for Colorado, who is helping supervise the probe.

Mr. Norton said "it is natural to assume" that the targets of the investigation include employees of Rockwell and the Energy Department who work at the 6,500-acre plant. But the prosecutor refused to elaborate and said "it is very premature to consider whether criminal charges will ultimately be brought."

The investigation, which began more than a year ago, became public yesterday when about 70 agents from the Federal Bureau of Investigation, along with federal environmental and energy investigators, began a search at the Rocky Flats facility 16 miles northwest of Denver. Prosecutors in Denver also opened a grand jury inquiry of the plant's operation.

Attorney General Dick Thornburgh, in a prepared statement, said he had "taken the highly unusual step" of disclosing the investigation and grand jury probe in part to assure the public that the government action "does not signal any major new environmental safety or health concern."

Officials of Los Angeles-based Rockwell referred inquiries to the Energy Department, which issued a

statement that it will fully cooperate with the investigation. "I have stated repeatedly that it is my intention to operate DOE facilties fully in compliance with pertinent statutes," said Energy Secretary James Watkins.

Prosecutors said the investigation came in response to evidence of possible environmental violations at Rocky Flats contained in submissions that plant employees made to the U.S. Environmental Protection Agency and the Colorado Health Department. Mr. Norton said he couldn't elaborate on other sources of allegations under investigation because they are under court seal. The investigation will last at least six more months, prosecutors said.

The specific allegations now under investigation include illegal disposal of radioactive and other hazardous wastes; the discharge into ground water of pollutants without a permit or in excess of permit limits; and concealment of the alleged contamination from federal and Colorado authorities.

Federal agents yesterday also began a search of an Energy Department office in Albuquerque, N.M., which supervises the Rocky Flats plant.

Prosecutors declined to comment on whether criminal investigations are under way at the 16 other government nuclear weapons plants overseen by the Energy Department. The Bush administration is now examining how to begin cleaning up radioactive and hazardous wastes that are contaminating the sites. The government has estimated it could cost more than $100 billion over the next several decades to clean up the mess.

LOS ANGELES TIMES June 7, 1989

Nuclear Weapons Plant Target of Federal Raid

Scores of Agents Descend on Facility Near Denver in Probe of Management of Radioactive Wastes

DENVER—Nearly 100 federal agents clad in protective clothing raided the sprawling Rocky Flats nuclear weapons plant Tuesday as the Justice Department launched its first criminal investigation of such a facility.

Officials refused to say what triggered the probe, but a statement issued by the Justice Department in Washington, D.C., said it focuses on the storage, treatment and disposal of hazardous and radioactive wastes "in the past."

Atty. Gen. Dick Thornburgh stressed that it "does not signal any major new environmental safety or health concern."

Agents from the FBI and Environmental Protection Agency arrived at the Department of Energy facility at 9 a.m. to seize an undisclosed number of records, conduct sampling and interview employees, said Bob Pence, agent in charge of the FBI in Colorado.

No Arrests Made

There were no arrests and no part of the plant was shut down, authorities said.

Agents also searched the Albuquerque operations office of the Department of Energy, which oversees the Rocky Flats plant.

There was no immediate comment from officials at Rocky Flats, which manufactures plutonium triggers on a 6,500-acre site 16 miles northwest of Denver. The facility, which employs about 6,000 people, has been operated by Rockwell International for the government since 1975.

"They won't tell us what the specific allegations are," said Richard Marquez, spokesman for the DOE's Albuquerque office. He said the search warrant did not name any individuals.

A spokesman at Rockwell headquarters in El Segundo, Calif., said only that the company was cooperating fully and that "this came as a surprise to us."

Pence said the raid followed a two-year joint investigation by the FBI and EPA.

"We're just getting started," he said in a telephone interview, adding that the FBI "will maintain our presence in the plant on a 24-hour basis."

Extensive Probe Expected

The search was expected to take approximately 10 days, but the Justice Department said the investigation itself would take six months to a year before any decision is made about filing charges. A federal grand jury inquiry into the plant operations also was under way in Denver, Thornburgh said.

The Justice Department said the specific allegations include "unpermitted treatment, storage and disposal of hazardous and mixed radioactive and hazardous wastes; the discharge of pollutants without a permit or in excess of permit limits; false certification of federal environmental reporting requirements, and concealment of environmental contamination."

The statement said it was "too early in the investigation to say who is a target.

"The investigation conducted thus far suggests that environmental violations are occurring, but we will need to assess the results of this search and conduct further investigation to better determine whether that is in fact the case, and, if so, who is responsible."

The Justice Department said that national security was not jeopardized because the search "is directed toward documents dealing with, and physical sampling of, hazardous waste—not the highly sensitive manufacturing and production processes but rather what is done with the hazardous wastes that are created."

David Runkle, an assistant attorney general at the Justice Department, confirmed that it was the government's first criminal investigation of a nuclear facility.

Pence said special precautions were taken for the agents who descended on Rocky Flats. All underwent medical examinations and attended safety and health lectures beforehand, he said, adding that "everyone is wearing special clothing" to protect against possible contamination.

Colorado's Democratic governor, Roy Romer, complained that he was caught flat-footed by the raid, which he first learned about Tuesday afternoon.

After twice touring the controversial plant in the past to look at employee safety procedures, Romer said, "I felt that there were some mistakes in the past but was under the impression that they had been cleared up.

"Today, I have to say to the people: 'Wait a minute, I don't know.'"

Rocky Flats has been dogged by criticism and controversy over the past decade. Earlier this week, the Sierra Club filed suit over environmental concerns relating to the plant's incinerators.

"Production concerns have been elevated over public health concerns, and there have been serious problems handling radioactive waste there," said Tom Bernard of the anti-nuclear Colorado Peace Network.

Safety violations closed the plant's main plutonium reprocessing building for four months last October. A December report by the Department of Energy listed 32 new safety problems and concluded that ground water contamination at Rocky Flats was the greatest single environmental hazard at any DOE facility.

Just last month, Congress was asked to finance a study to determine whether there is a link between pollution from Rocky Flats and cancer cases or birth defects in metropolitan Denver. The city has a population of about 2 million.

The proximity of the plant to the metropolitan area also became a key issue last year when boxcars of radioactive waste backed up at Rocky Flats when the state of Idaho refused to accept any more shipments until the federal government set a date for opening a permanent disposal site in Carlsbad, N.M.

Lab Near Chatsworth

A Department of Energy official said Tuesday the probe does not appear to extend to Rockwell's Santa Susana Field Laboratory just west of Chatsworth, where the company for more than three decades has done nuclear power research for the government. The Department of Energy has documented chemical and radioactive pollution problems at the lab two miles southeast of Simi Valley, and recent news reports alleged that environmental officials weren't fully informed about waste disposal practices at the site.

Unlike Rocky Flats, there is no data showing that contamination ~~at Santa~~ Susana has migrated off site.

Staff writers Robert L. Jackson in Washington, Myron Levin in Los Angeles and researcher Lisa Romaine in Denver contributed to this article.

Arvada Sentinel – June 7, 1989 – Page 21

FBI, EPA open investigation of Rocky Flats nuclear plant

By Nan O'Neal

More than 70 FBI agents and other investigators searched the Rocky Flats nuclear weapons plant yesterday for evidence of possible criminal violations of environmental laws at the nuclear weapons plant.

At the same time, a grand jury investigation into environmental contamination at the plant was opened in Denver.

"The purpose of our investigation is to determine what, if any, criminal violations may have occurred in the storage, treatment and disposal of hazardous wastes and mixed hazardous and radioactive wastes at the Rocky Flats facility in the past," said Attorney General Dick Thornburgh.

The investigation involves alleged violations of clean air and water laws and possible false certification of federal reports and concealment of contamination.

Seventy FBI agents and agents from the Environmental Protection Agency's Office of Criminal Investigations and representatives of the Department of Energy's Inspector General entered the plant with a search warrant at 9 a.m. Tuesday. The search is expected to take 10 days.

Rocky Flats is operated by Rockwell International for the Department of Energy, and produces plutonium triggers for nuclear bombs.

Agents also began a search of DOE's Albuquerque operations office, which supervises Rocky Flats operations.

Thornburgh said the investigation "does not signal any major new environmental safety or health concern," but is being conducted in response to allegations of environmental contamination that have circulated for some time and have been investigated before by the General Accounting Office, the investigative arm of Congress.

Thornburgh said DOE Secretary James Watkins is

cooperating with the investigation and has committed his department to the cleanup of any environmental hazard that may be found at the plant.

U.S. Attorney Michael Norton said his office was brought in after a year-long investigation by the FBI and EPA and that his investigation will take another six months.

Norton said more evidence is needed to determine who is responsible for possible violations.

"It is too early in the investigation to say who is a target (of the investigation).

"The investigation conducted thus far suggests that environmental violations are occurring," Norton said.

Specific allegations include prohibited treatment, storage and disposal of radioactive and other hazardous waste; polluting with a permit or in excess of permitted limits; false certification of federal environmental reporting requirements; and concealment of environmental contamination.

The U.S. Attorney also asked a federal court to halt a Sierra Club suit against DOE and Rockwell International while the investigation is under way.

Norton said the investigation will not affect national security as it deals with waste, not production of weapons parts.

The Rocky Flats plant will remain open during the investigation.

Rocky Flats officials refused to comment on the investigation.

Page 4 – June 8, 1989 – Westminster Sentinel

FBI opens investigation of Rocky Flats

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Broomfield Enterprise

June 8, 1989

FBI OPENS INVESTIGATION OF ROCKY FLATS

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see ROCKY FLATS, Page 4

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Saturday, June 10, 1989 Austin American-Statesman A3

HAZARDOUS WASTE BURNED ILLEGALLY

FBI DOCUMENT SHOWS ROCKY FLATS VIOLATIONS

DENVER (AP)—Aerial infrared surveillance showed hazardous waste being illegally burned at the Rocky Flats nuclear weapons plant, according to an FBI affidavit unsealed Friday in this week's federal raid on the facility.

The affidavit also accused Rocky Flats operators of illegally discharging pollutants into two creeks that flow into water supplies serving four metropolitan cities and of unpermitted dumping of hazardous waste.

U.S. Magistrate Hilbert Schauer unsealed the affidavit after a newspaper challenged withholding of the information that led Schauer to issue a search warrant for the raid Tuesday on the plant 16 miles northwest of Denver.

The 116-page affidavit catalogs the allegations made by FBI agent Jon Lipsky and indicates the investigation into possible criminal violations of hazardous waste laws will review activities at the nuclear weapons plant going back to November 1980.

Rocky Flats is operated by Rockwell International Corp. for the Department of Energy. The plant makes plutonium triggers for nuclear weapons.

The affidavit also questions the Energy Department's decision to award an $8.6 million bonus to Rockwell for excellent management of Rocky Flats.

On Tuesday, 75 FBI and Environmental Protection Agency agents raided Rocky Flats. On Wednesday, the Colorado Department of Health announced it had found 25 environmental violations at the plant.

The affidavit revealed that the FBI conducted aerial infrared surveillance at the plant on three nights in December to determine whether the incinerator in a plutonium reprocessing building that was closed for safety

violations was being illegally operated. They found that it was. Building 771 had been closed by DOE inspectors in October. It reopened in January.

The affidavit went on to say that there was probable cause to believe Rockwell and Energy Department officials in November 1985 falsely certified that Rocky Flats was in compliance with all applicable ground water monitoring requirements under the 1976 Resource Conservation and Recovery Act.

"In fact, various Rockwell and DOE officials were aware of serious contamination and were informed that the monitoring system was deficient and did not comply with the RCRA," the affidavit said.

INVESTIGATION AT ROCKY FLATS

Rocky Flats illegally burned, dumped waste, U.S. claim

By Bruce Finley
and Thomas Graf
Denver Post Staff Writers

The Rocky Flats nuclear weapons plant illegally burned waste in incinerators and dumped material into streams for years and may still be doing so today, a U.S. Justice Department affidavit alleges.

In the 116-page affidavit released yesterday, federal agents say that even after one Rocky Flats incinerator was announced to have been shut down last fall, operators were burning radioactive materials at night.

Other allegations are that plant operators delivered millions of pounds of hazardous waste—some of it mixed with radioactive plutonium and some not—to dumps around the country without proper permits. Investigators also say Rocky Flats officials underreported waste production, and falsified documents to hide environmental crimes.

The affidavit was filed to obtain the search warrant federal investigators used to gain access this week to the 6,550-acre U.S. Department of Energy plant, located about 16 miles northwest of downtown Denver. The plant is operated by Rockwell International.

Scores of federal agents are searching Rocky Flats, where plutonium is processed for use in nuclear weapons.

In the affidavit, officials say they have cause to believe "that Rocky Flats is using an outdated and unpermitted incinerator in Building 771," a facility for processing plutonium, "to illegally 'treat' at least nine hazardous or mixed wastes in violation of the Resource Conservation and Recovery Act."

"Mixed waste" refers to a blend of radioactive and

otherwise hazardous material.

The waste allegedly was being burned in December 1988, when the U.S. Environmental Protection Agency and the public were told that the building was shut down, the affidavit added.

FBI nighttime surveillance flights in December, using infrared cameras, provided evidence that the Building 771 incinerator was being used to burn waste, the affidavit said.

Federal agents also allege several unreported discharges of hazardous waste into streams at the plant in November and December 1988. Those discharges went "into creeks crossing the Rocky Flats property and leading to metropolitan Denver drinking water supplies, which contained chemical pollutants not authorized by Rocky Flats' (Clean Water Act) permit," the document said.

Analysis of one water sample taken from Walnut Creek on Nov. 16 provided evidence of contamination with unexplained medical waste, according to the affidavit.

Rocky Flats, which makes triggers to detonate nuclear weapons, reported in 1985 that it generated an estimated 31.6 million pounds of 35 to 40 different types of hazardous and mixed waste per year. Some of that waste, the affidavit alleges, was sent illegally to various dumps that lack federal environmental permits.

Another group of allegations concerns false statements and concealment to "keep the public from knowing just how really bad the site is," said the affidavit, which refers frequently to memos obtained from Energy Department employees.

There is probable cause to believe that Rockwell and (Energy Department) officials have knowingly and falsely stated Rocky Flats' compliance with environmental laws and regulations and concealed Rocky Flats' serious contamination," the affidavit said.

Also, the affidavit said, "false statements and concealment of material facts have occurred" at the plant.

The investigation also is looking into whether

performance bonuses were paid to Rockwell based on falsified evaluations.

In May 1987 the Energy Department awarded Rockwell a performance bonus of about $8.6 million based on the department's ratings of Rocky Flats' health and safety standards as "very good" and Rockwell management as "excellent," the affidavit said.

That money was awarded even though a 1986 Energy Department memorandum had concluded that Rocky Flats "in poor condition generally in terms of environmental compliance" and that some of its waste facilities were "patently illegal" the affidavit said.

HAZARDOUS WASTES PRODUCED

Listed below are some of the wastes generated by Rocky Flats, the quantity in pounds the plant claims to have produced each year, and how officials say they stored or disposed of each type of material.

- Intercepted pond seepage (chloroform, trichloroethane) — 29,129,284 pounds; physical chemical process.
- **Acid wastes** — 1,627,890 pounds; drums, tanks.
- **Pond sludge** — 848,232 pounds; drums.
- **Chromic acid** — 28,565 pounds; containers and tanks.
- **Coolant** (trichloroethane) — 9,691 pounds; drums; tanks and incineration.
- **Etchant solution** (10 percent acid) — 7,798 pounds; drums, tanks.
- **Oil contaminated with solvents** — 6,405 pounds; drums, tanks.
- **Sodium hydroxide** — 2,997 pounds; drums, tanks;
- **Cadmium cyanide** — 2,684 pounds; drums, physical chemical process.
- **Sulfuric acid** — 2,033 pounds; tanks.
- **Salts** (sodium nitrated potassium, nitrate mixture) — 1,196 pounds; drums, physical chemical process

- **Metal heat treating salts** (barium chloride) — 998 pounds; drums, physical chemical process.
- **Pyradine** — 276 pounds, drums.
- **Fixer** (radiographic solutions) — 237 pounds; drums, physical chemical process.
- **Ox out** (spent cyanide) — 154 pounds; drums, tanks.
- **Cyanide waste** — 22 pounds; drums, physical chemical process.

Sat., June 10, 1989, Denver, Colo.
Rocky Mountain News – 7

TROUBLE AT ROCKY FLATS

FBI: Flats Burned Waste Secretly

By SUE LINDSAY and JANET DAY
Rocky Mountain News Staff Writers

FBI agents took infrared aerial photographs over the Rocky Flats nuclear weapons plant last December to show illegal hazardous waste incineration in a building previously ordered shut down for safety problems, according to documents released yesterday.

The unsealed affidavit that triggered Tuesday's raid on the plant details a massive two-year investigation of waste disposal at the Jefferson County facility.

In the document, the FBI also reports finding dangerous chemicals flowing from the plant into nearby creeks that drain into public water supplies.

Gov. Roy Romer said yesterday, "We need to check out every allegation that is in this document. If it (the plant) can't meet criteria for health and safety, we close it down."

The 116-page affidavit indicates that the investigation dubbed "Operation Desert Glow" will review activities at the plant dating back to November 1980. Two former Rocky Flats employees were sources of information for the investigation, the document said.

The records search is expected to last at least through next week, said Bob Pence, agent in charge of the Colorado FBI office.

U.S. Magistrate Hilbert Schauer unsealed the affidavit after a challenge was made Wednesday by the *Rocky Mountain News*. The document provided the basis for a search warrant issued by Schauer to the FBI and Environmental Protection Agency, triggering Tuesday's raid on the plant by 75 federal agents and dozens of EPA investigators.

"It's obvious that the federal government needs to get its act together," Romer said yesterday. "It's incredible that one agency of the federal government is sending an investigative team to check out the other. Let's hope it doesn't go as far as the Chinese army."

In addition to illegal incineration, the affidavit details:

✓ Illegal dumping of chemicals and experimental medical waste into drinking water supplies on Nov. 15 and 19.

✓ Falsifying records submitted to state health officials and the Environmental Protection Agency in 1985 and 1986. The records claim Rocky Flats complied with groundwater regulations.

✓ Using an old waste pond in December, 10 days after EPA denied a request to use the pond.

✓ Improper mixing of chemical and radioactive wastes in 1985.

✓ Ongoing improper storage that could lead to a build up of explosive hydrogen gas.

✓ Illegal disposal of hazardous materials through the plant's sewage treatment plant.

Rocky Flats is operated by Rockwell International Corp. for the Department of Energy. The plant, 16 miles northwest of Denver, makes plutonium triggers that detonate nuclear bombs.

Plant officials yesterday referred calls to DOE in Washington. Energy Department officials yesterday were reviewing the document and don't expect to have any comment until next week, said Chris Sankey, agency spokeswoman.

"If the allegations are true, the Department of Energy has a much larger problem than an impact on their credibility," said Melinda Kassen of the Environmental Defenses Fund in Boulder. "We're talking about alleged criminal activities which if

See FLATS, page 36

FLATS/from page 7

this were a private company, would result in its immediate shutdown.

"We are talking about activities that deserve jail sentences," said Kassen, also a member of the governor's Rocky Flats Environmental Monitoring Council. We're talking about plant officials who believe they're outside the law."

Both DOE and Rockwell, if convicted, would face fines of at least $25,000 per day per violation. If company or agency officials are implicated, they would face prison sentences as well.

The affidavit revealed the FBI carried out infrared surveillance flights at the plant on three nights last December to determine whether the incinerator was being illegally operated, and found that it was. At the time, Building 771 had been closed by DOE inspectors since October. It reopened in January.

"**EPA EXPERTS** in infrared photographic interpretation from the Environmental Monitoring Systems Lab in Las Vegas, Nev. have interpreted the FBI aerial photography and confirm that the Building 771 incinerator stack was thermally active on the nights of December 9, 10 and 15, 1988," the affidavit said.

EPA officials for years have tried to gain authority over operations in the incinerator building and continue to worry about what is being burned inside, said Jim Scherer, EPA regional director in Denver.

DOE officials claim operations involving plutonium are secret because of the threat to national security.

Investigators also believe waste may have been burned in another incinerator plant officials said was mothballed last year. That incinerator was designed to burn mixed chemical and low-level radioactive waste, but never permitted to open after widespread public opposition.

Burning chemical waste without proper controls could spew suspected cancer-causing dioxins and plutonium into the metropolitan area.

FBI agent Jon Lipsky, who wrote the affidavit, said he believed waste was being improperly stored or burned because the amount of waste generated at the plant exceeded its storage space. In 1984, the plant generated nearly twice the waste it had estimated could be stored or treated.

FBI agents also observed suspected cancer-causing chemicals and experimental medical waste flowing into Walnut Creek on Nov. 15 and 16. The creek runs through the Rocky Flats property toward Great Western Reservoir, past of Broomfield's waste supply.

In December, FBI surveillance revealed illegal discharges from the Rocky Flats sewage treatment plant to Woman Creek on three days. Woman Creek flows into Standley Lake, the source of water for Thornton, Northglenn and Westminster.

According to an EPA analysis, much of the contamination was medical waste from a research laboratory at the plant. Three chemicals are considered experimental—two are used to follow migration of radioactive materials in groundwater and one has been tested for its ability to prevent cellular damage from radiation.

"What kind of experimentation is going on out there on people? They don't need those types of chemicals to make (weapons parts)," said Maggie Fox, southwest regional director for the Sierra Club. "People downstream end up drinking some serious chemicals."

Investigators and health officials say the investigation does not indicate any immediate health threat to workers or nearby residents.

"The Department of Energy and the Department of Justice confirmed to me today that they have not yet found

anything in their investigation which is indicative of an ongoing threat to health," Romer said.

But environmental groups claim the water pollution and incineration are dangerous and the plant should be shut down.

FBI agents also are looking into various allegations that Rockwell and DOE made false statements to state and federal officials. In one instance in November 1985, officials claimed that Rocky Flats was in compliance with groundwater monitoring requirements when they knew the system was deficient and were aware of serious contamination, the affidavit states.

The *Rocky Mountain News* yesterday reported that the General Accounting Office also has launched an investigation of performance bonuses awarded Rocky Flats' managers.

GAO investigators will study an $8.6 million bonus from DOE to Rockwell for its "excellent" management at Rocky Flats in May 1987. The bonus was awarded despite other DOE findings that some waste facilities were "patently illegal," that Rockwell had significant problems controlling radioactive contamination and that Rockwell had given DOE erroneous and incomplete reports on environmental, health and safety matters.

A DOE memo in July 1986 stated that Rocky Flats was "in poor condition generally in terms of environmental compliance," that its permit applications were "grossly deficient," the affidavit said.

The DOE memo also described its efforts to keep the public from knowing "just how really bad the site is."

The affidavit quoted Raymond Romatowski, former manager of DOE's Albuquerque operations office which oversees Rocky Flats, advising DOE's acting secretary for defense programs in 1987 that DOE should "send a message to EPA that DOE and its management contractors are willing to 'go to the mat' " in opposing enforcement action at

DOE facilities," the affidavit said.

THE GAO investigation was the third blow sustained by the facility this week.

In addition to the raid by FBI and EPA agents, the plant also came under fire Wednesday from the Colorado Department of Health, which announced it had found 25 environmental and procedural violations at the plant.

FBI agents also raided the Albuquerque office this week to gather documents which may show how far up the chain of command illegal waste disposal was condoned.

Saturday, June 10, 1989 DAILY CAMERA

Flats charges include illegal waste burning

Document claims chemicals put in creeks feeding water supplies

By RUSTY PIERCE
Camera Staff Writer

Rocky Flats employees illegally burned waste at night, dumped chemical waste and sewage into creeks that feed public water supplies, illegally stored waste and lied to cover up everything.

Those are the allegations in the affidavit that backs up the massive FBI investigation this week at Rocky Flats nuclear weapons plant, eight miles south of Boulder. The affidavit was unsealed Friday.

FBI agents flew over the plant at night and used infrared photography to uncover some of the alleged violations, according to the affidavit.

The nighttime flights revealed that an older incinerator in Building 771 was used to burn waste during the nights of Dec. 9, 10 and 15. A follow-up flight in February indicated that the incinerator probably was burning waste again. The affidavit reveals that a newer incinerator may have been used to burn wastes, even though Rocky Flats did not have a permit.

The infrared photographs also indicated thermal activity "forming a path from Rocky Flats' sewage treatment plant to Woman Creek." That thermal activity has been interpreted by the Environmental Protection Agency as liquid discharges from the sewage treatment plant into Woman Creek.

Woman Creek feeds Standley Lake, which holds the water supply for Westminster, Thornton and Northglenn. Those discharges are not allowed by any of Rocky Flats' permits.

The infrared photography also indicated that hazardous

wastes were present in two ponds on the Flats property.

Agents also installed water monitoring devices on properties adjacent to Rocky Flats to monitor the plant's discharges into Walnut and Woman creeks.

On Nov. 15, agents determined that chemicals had been discharged into Walnut Creek that feeds Great Western Reservoir, the water supply for Broomfield.

On Nov. 16, a chemical that has "been experimentally tested concerning its ability to protect against radiation-induced cellular damage" was found in trace amounts in Walnut Creek.

Two of the other detected compounds have been used experimentally in attempting to follow the migration of radioactive materials in ground water,

(See ROCKY, Page 5A)

(From Page 1A)

the affidavit stated. The plant failed to report that the discharges into those creeks contained the pollutants, and the discharges violated the Clean Water Act, the affidavit stated.

Two discharges into Walnut Creek and Woman Creek on Nov. 25 also went unreported, the affidavit revealed.

The affidavit states that Rocky Flats generates 35 to 40 hazardous or mixed wastes that are sent for "final disposal" to on-site facilities that do not have Resource Conservation and Recovery Act permits or interim status.

"The knowing treatment, storage or disposal of hazardous or mixed wastes without a permit or interim status is a RCRA felony," the affidavit states. The violations are punishable by up to $25,000 for each day the plant commits violations.

Part of the investigation involved an enormous paper chase in which documents, applications and reports from the plant were compared to one another.

Paperwork indicated that the plant generated 13,000 pounds of hazardous wastes in 1983 but that only 5,207

pounds, or "less than half the total amount indicated," were shipped to a facility or stored. "Disposal of the remaining wastes was not indicated," the affidavit stated.

A revised RCRA application in 1985 revealed that Rocky Flats annually generates more than 31.6 million pounds of mixed hazardous wastes.

The affidavit also alleges that Rockwell and Department of Energy officials have knowingly and falsely stated the plant's compliance with environmental laws and regulations and have concealed Rocky Flats' contamination.

"Consistent with their efforts to keep the public from knowing 'just how really bad the site is,' a July 1986 DOE memorandum said, 'There is probable cause to believe Rockwell and DOE officials have knowingly and falsely stated Rocky Flats' compliance with environmental laws and regulations and concealed Rocky Flats' serious contamination,' " the affidavit said.

In a DOE memorandum dated Nov. 13, 1987, Raymond Romatowski, manager of the DOE's Albuquerque Operations office, said DOE should resist the efforts of environmental and public health authorities trying to clean up Rocky Flats and other DOE facilities. He suggested they send a message to the EPA that DOE and its management contractors are willing "to go to the mat" in opposing enforcement actions at DOE facilities.

A DOE memorandum stated in July 1986 that Rocky Flats was "in poor condition generally in terms of environmental compliance, that its permit applications were 'grossly deficient' and that some of its waste facilities were 'patently illegal,' " the affidavit states.

Yet in May 1987, DOE awarded Rockwell an $8.6 million performance bonus, based on Rockwell's "alleged 'excellent' management at Rocky Flats," the affidavit states.

The DOE will not comment on the affidavit or its allegations because a criminal investigation is pending.

DOE has sent a special independent investigation team to Rocky Flats and the team has "not found any condition or

situation which presents an imminent danger to the public's health or safety."

BROOMFIELD HOTLINE

Broomfield residents with questions about the safety of their water can call city officials this morning on a special telephone hotline.

City officials say they carefully monitor their water supply, which is fed by a creek that passes through the Rocky Flats nuclear weapons plant. Details and assurance are available by talking this morning to top city administrators, council members and the city's chemist.

The hotline, 469-3304, will be open from 8:30 a.m. to noon.

Romer says he'll close plant if it's unsafe

Associated Press

DENVER—Gov. Roy Romer said Friday if the Rocky Flats nuclear weapons plant cannot meet criteria for health and safety he will close it down, but he rejected demands from activists that the plant be closed immediately.

Romer held a news conference to discuss a federal affidavit that accused the U.S. Department of Energy of serious health violations at the plant that included the dumping of hazardous wastes into the water supplies of Northglenn, Westminster and Broomfield, and the illegal burning of hazardous and radioactive wastes using uncertified incinerators. "We need to check out every allegation that is in this document," Romer said.

"If it (the plant) can't meet criteria for health and safety, we close it down," he said, but added, "A government memo is not a fact."

Rep. David Skaggs, D-Colo., whose 2nd District takes in the Rocky Flats plant, was more philosophical about the plant and its continued operation.

He said he is "re-examining the question" of whether the

plant should be shut down immediately. But it would be "premature to draw any conclusions about allegations."

He was pleased the plant's operators are cooperating with the investigation, he said and noted nothing has been found to indicate there is an immediate health danger.

The revelations in the FBI affidavit "reinforces my view ... that the Department of Energy and its contractors are inherently unsuited to police themselves in these sensitive areas." Skaggs said.

Sen. Tim Wirth, D-Colo., said the release of the affidavit means "the era of DOE's refusal to accept outside review is over."

ALLEGATIONS AT-A-GLANCE

The affidavit, filed for the Rocky Flats [illegible] alleges:

■ Illegal treatment, storage and disposal of hazardous and toxic wastes without a permit or interim status under the Resource Conservation and Recovery Act.

The plant generated at least [illegible] 40 hazardous an mixed wastes that are sent for final disposal to various on-site facilities which do not have permits or interim status under RCRA.

■ Use of an outdated and unpermitted incinerator in Building 771 to treat at least some hazardous and mixed wastes in violation of the Resource Conservation and Recovery Act.

■ Illegal discharge of pollutants into Walnut and Woman creeks.

On Nov. 15 and 16, Rocky Flats discharged various chemicals into Walnut Creek. On three days in December, FBI surveillance revealed, discharges from Rocky Flats sewage treatment plant into Woman Creek.

Woman Creek feeds Standley Lake, the water supply for Westminster, Northglenn, and Thornton. Walnut Creek drainage flows into the Great Western Reservoir, a water supply for Broomfield.

■ False statements and concealment on the part of Rockwell and Department of Energy officials who have "knowingly and falsely stated Rocky Flats' compliance with environmental laws and regulations and concealed Rocky Flats' serious contamination."

The alleged false statements and concealment include:

■ Officials falsely certifying in November 1985 that Rocky Flats complied with ground water monitoring requirements when they knew that the monitoring system was deficient and there was serious contamination.

■ Rockwell providing the Department of Energy with erroneous and incomplete reports on environmental health

and safety matters. DOE awarded Rockwell a perform-

(See ALLEGATIONS, Page 5A)

(From Page 1A)

ance bonus of $8.5 million in May 1987 for Rockwell's alleged "excellent" management at Rocky Flats.

- Rocky Flats officials failing to report two discharges from the plant into Walnut Creek on Nov. 15 and Nov. 16, 1988.
- Rocky Flats also failing to disclose three illegal discharges in December 1988 from the plant's sewage treatment facility into Woman Creek on three days in December 1988.
- The plant's Building 771 incinerator was used to treat or dispose of hazardous or mixed wastes, contrary to public statements that Building 771 was shut down from October to late January.

– Rusty Pierce

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ROCKY FLATS ROUND-UP
CITY LIMITS

THE STATE KNEW IT—AND BLEW IT

Gov. Roy Romer could barely contain his anger when he learned the state hadn't been told of an undercover FBI investigation at Rocky Flats. "I am outraged by the possibility that some possible criminal act has occurred at Rocky Flats that may have endangered the population of this area," he said on June 6, the day the probe was disclosed.

But it wouldn't have been difficult for Romer to read all about criminal acts at the nuclear weapons plant. There's plenty of evidence in a spot where Romer has easy access: the state health department.

That's where the FBI obtained most of its information.

Although its investigation lasted nearly two years, the FBI didn't come up with much that hadn't already been collected by the Colorado Department of Health (CDH) and the Environmental Protection Agency.

Not that there isn't a lot of evidence in those files. Regulators at both the EPA and CDH knew Rocky Flats had been illegally disposing hazardous wastes for almost a decade. The agencies had the authority to impose hefty fines and shut the plant down. They did neither.

Finally, the FBI stepped in and seventy-five agents raided the plant. But would that have been necessary if regulators had been more aggressive?

A joint EPA and CDH inspection in 1983 established that Rockwell International, which operates Rocky Flats under contract with the Department of Energy, had been storing and disposing hazardous waste without the required permit since at least 1981. Plant managers had insisted a permit wasn't necessary because the waste fell below the minimum amount requiring a permit, and none of it was stored longer than ninety days. The inspection revealed

both claims were false—and Rockwell knew it.

The EPA demanded Rockwell file for a permit, and the company finally complied. Its application indicated Rocky Flats produced 13,000 pounds of hazardous waste annually, and that about 5,200 pounds were tucked away to a licensed disposal site. The application didn't mention what happened to the rest of the waste.

In 1984, the state health department assumed primary responsibility for monitoring hazardous waste disposal at Rocky Flats. Its enforcement tool was identical to the feds': a $25,000-a-day fine for each violation.

The CDH demanded a waste-disposal permit application from Rockwell, too. This time, plant managers estimated Rocky Flats produced 31.6 million pounds of hazardous and radioactive waste each year.

But Rockwell had failed to disclose all sources of waste material on the 1985 application, and the CDH determined it was incomplete. The department issued a deficiency notice. When Rockwell failed to respond adequately, CDH regulators threatened to deny the permit application and shut the plant down.

For months Rockwell and DOE officials argued that Rocky Flats, a federal facility, was exempt from the state's authority. But in 1986, they signed an agreement to comply with state hazardous waste regulations and submit a new permit application.

A 1987 CDH inspection disclosed fourteen violations, including inaccurately designating some hazardous waste as non-hazardous, and disposing of it in a Rocky Flats landfill designated for non-hazardous materials. The CDH again issued a notice of deficiencies, threatening to deny the permit application if conditions weren't corrected.

Most weren't. In May 1988, the state health department charged Rockwell with nine violations of hazardous waste laws and the '86 compliance agreement. Other violations were found during inspections in June, November and December of last year, including leaking drums, inadequate

waste analysis and incomplete identification of waste containers. CDH notified Rockwell of these violations in January, and in March told plant managers it would deny parts of the latest permit application because Rockwell had failed to provide adequate information. But the state didn't announce its decision to impose penalties on the plant until June 7—the day after the FBI raid.

A similar pattern of know-something/do-nothing appears in the state's handling of groundwater contamination. As early as 1985, regulators knew the plant was illegally fouling the groundwater, and that Rockwell had knowingly misrepresented its protection measures.

Today, Rockwell still doesn't have a permit to dispose of hazardous waste at Rocky Flats. The CDH has yet to determine the dollar amount of the 1988 penalties, let alone the violations announced earlier this month. Nor has it sought court approval to impose those penalties, as required by Colorado law. All the state has done is pursue settlement talks with Rockwell.

Except for violations of PCB regulations that resulted in a $47,500 penalty, the EPA hasn't imposed any fines on Rockwell, either—even though the agency's responsible for enforcing clean water laws and Rockwell managers have disclosed at least five illegal discharges into creeks that cross Rocky Flats since 1986.

Had the CDH and EPA levied penalties, Rockwell's balance sheet wouldn't have suffered; the DOE allows contractors managing federal facilities to be reimbursed for any fines they incur. But at least the fines would have alerted the DOE—not to mention Romer—to major problems at the plant.

David Shelton, director of CDH's hazardous waste division for the past two years, says the delay in getting a permit in place for Rocky Flats isn't unusual.

"The fact that it has lagged as long as it has is unfortunate," he says. "But with the people and resources we've got, we can't do things any faster. I can't put a team

of five or six people on this full time. The people handling it are the same ones who have to do the inspections and respond to citizen complaints."

A substantial hike in fees paid by regulated industries would provide more funds for enforcement, but Shelton thinks that's unlikely given the anti-tax sentiment that dominates the legislature.

Denver environmentalist Adrienne Anderson, who directs the new federal installation toxics project for the National Toxics Campaign, says the state health department isn't serious about using what resources it has to enforce environmental laws. During the year that ended last September 30, she says, the CDH collected only $25,175 in fines, although it knew of twenty-seven different situations involving multiple instances of illegal pollution that could have resulted in penalties of $25,000 per violation per day.

The CDH and EPA "act as booster clubs for the major polluters in the area, particularly the major military or energy department facilities such as Rocky Flats, the Rocky Mountain Arsenal [run by the Army] and Martin Marietta [which contracts with the Air Force]," Anderson charges.

Jim Stone agrees. A Rocky Flats engineer until he was laid off in 1986, Stone contends he was fired for pestering managers about unsafe working conditions. He's suing Rockwell, alleging breach of contract.

Rocky Flats' management was so inept that nearby residents risked environmental contamination, Stone says. But he saw no point in going to the EPA with his complaint. There was no indication of any oversight from them," he says. "I would have gone to them if they'd shown any interest, but they didn't."

Later that year, a friend suggested Stone approach the FBI. As it happened, the bureau had an agent stationed in Denver who specialized in environmental enforcement. Jon Lipsky met with Stone and William Smith, an agent with the EPA's criminal enforcement division.

Nearly two years later, Lipsky summarized the evidence of illegal dumping and burning of hazardous waste in a 116-page affidavit he filed to get a court order to search Rocky Flats for additional evidence. None of the information in the affidavit came from current or former Rocky Flats employees; most can be found in CDH and EPA files. Lipsky reported that he'd interviewed two former Rocky Flats workers, but only to determine the locations of records agents wanted to find during their search.

It's possible ex-employees provided information that isn't disclosed in the affidavit. But all of the allegations in Stone's suit against Rockwell concern hazards facing Rooky Flats workers, and Lipsky hasn't investigated those.

Stone did, however, provide the FBI agent with a July 14, 1986, memo addressed to a DOE assistant secretary in which the author says Rocky Flats "is in poor condition generally in terms of environmental compliance," that some of its permit applications are "grossly deficient," and that the '86 agreement reached with the EPA and CDH "has taken attention away from just how bad the site really is."

Lipsky's affidavit quotes this DOE memo extensively, although it doesn't indicate the author. Stone says it was written by a DOE lawyer and hints he received it from a current or former Rockwell employee.

The memo fueled Lipsky's interest in possible criminal activity at Rocky Flats and may even have triggered his investigation. Tom Speicher of the EPA's regional counsel office won't comment on the Rocky Flats probe, but says there's no specific formula dictating when a civil enforcement action becomes a criminal investigation. Although criminal convictions don't carry larger fines, the defendants could be sent to jail for up to two years for each violation.

Criminal charges require establishing "knowing" violations, but the EPA and CDH have had evidence of that at Rocky Flats since 1983. "If the health department had been enforcing the law we passed in this state, we wouldn't

have seen the level of extreme action we're seeing with the FBI probe," Anderson says.

Once he started his investigation, Lipsky quickly found evidence of numerous "knowing" violations in EPA and CDH files. In the affidavit, the only new information uncovered by the FBI was the apparently illegal use of an incinerator and evaporation ponds during three days last December (discovered through the use of infrared equipment on an airplane flown over Rocky Flats), three instances of dumping treated sewage and six instances of dumping hazardous waste into creeks that cross the plant, documented with infrared equipment and monitors just outside Rocky Flats property.

But the CDH and EPA had known since at least 1985 that Rockwell's numbers didn't add up. That should have clued them in that the rest of the waste was going *somewhere.*

And regulators should have been aware of some of the illegal discharges. Two of the three detected by the FBI in November were disclosed by Rockwell in a monthly report submitted to the EPA on December 19. Those same reports had disclosed five other illegal dumpings since March 1987, but the EPA never imposed fines.

But it's not clear if regulators even read the reports they received from Rockwell.

Stone wouldn't be surprised if they haven't. "They don't even read their own files," he says.

Neither, apparently, does Romer.

—Bryan Abas

Ex-worker makes public $1 billion Rockwell suit

By Bill Scanlon
Camera Staff Writer

DENVER—A $1 billion lawsuit charging former Rocky Flats contractor Rockwell International with law-breaking and fraud was made public Tuesday, but the U.S. Justice Department has not agreed to join in the suit.

So, Rocky Flats whistleblower Jim Stone and his attorney Hartley David Alley will try alone to win their lawsuit, filed 16 months ago under the False Claims Act. Stone, who worked as an engineer at the nuclear weapons plant from 1980 to 1986, complained for years of safety problems and plutonium in the ductwork at the plant.

U.S. District Judge James Carrigan agreed to let the lawsuit go public this week, saying that if claims in it are true, they are of widespread public interest and shouldn't be sealed. U.S. attorneys in Washington, D.C., have asked for several extensions on their investigation of the merits of the lawsuit, saying that until recently they couldn't get their hands on documents seized in the June 1989 FBI raid of Rocky Flats.

Rockwell spokesman Jeff Charney said the company won't comment until it gets a chance to review the suit.

The lawsuit also charges that Rockwell knew it was breaking environmental laws, but didn't acknowledge it, es-

(See **ROCKWELL, Page 3A**)

Rockwell lawsuit goes public

(from Page 1A)

pecially not when its bonuses were being considered.

Rockwell received $62 million in bonus awards from 1979 to 1988, including $16 million for doing better than expected in such areas as quality, production and environmental health and safety. Stone's lawsuit charges that Rockwell defrauded taxpayers—winning bonuses by being dishonest

about its compliance with environmental laws.

"Jim Stone is an individual who would not be silenced," Alley said at a news conference in Denver Tuesday.

In September 1989, consultants from an independent safety assessment team listened to Stone's allegations.

They concluded that managers should have investigated his contention that there may be plutonium in the air ducts. But they concluded that most of the rest of his allegations were unfounded, mostly because Stone wasn't privy to how things were done there.

Stone had quoted scuttlebutt from workers who said uncontrolled nuclear chain reactions, or criticalities, happened "all the time." But the team concluded a criticality never occurred at Rocky Flats and said the workers had been referring to safety infractions that could lead to a criticality, not a criticality itself.

"This is a bet-the-company case for Rockwell," said Alley. "We're in this for as long as it takes." Rockwell, a $12-billion-a-year corporation, earned a profit of $800 million last year.

"I was concerned at the unconscionable actions at Rocky Flats," said Stone. "I was angered they did not allow me to do my job. I want to set a precedent around the country. We want to give money back to taxpayers."

Friends and ex-colleagues of Stone say he is a sincere man who sometimes sees conspiracies when all they see are small problems.

Stone said he is not as frustrated today as he was a year ago when he was saying that lying and cheating by the U.S. government and its contractors was so endemic that the only recourse might be armed revolution. Stone said he wants to file similar suits to try to clean Rocky Mountain Arsenal, the Lowry Landfill, the old Colorado radium industry, the wastewater treatment plant in Brighton and the bubonic plague.

Last year, a Jefferson County District judge rejected his claim that he was wrongfully fired by Rocky Flats.

"I'm a crusader. I know I'm a nut for trying to do things right, to make companies accountable for their mistakes," he said. "I don't mind the term 'radical.' Not if it has to do with preserving the environment and people's health and safety."

Stone and Alley are setting up two hotlines, hoping to get workers, ex-workers and members of the public to share stories of fraud, waste and safety violations. The local number is 424-9749, the other (213) 383-4884.

Many of Rocky Flats whistleblower's claims aren't new

By Bill Scanlon
Camera Staff Writer

The False Claims Act allows anyone with "original knowledge" of fraud to begin a lawsuit on behalf of the government.

That means a suit cannot be filed based on information found in the media or from a government hearing, report, audit or investigation.

Most of the claims in Rocky Flats whistleblower Jim Stone's $1 billion lawsuit against Rockwell International aren't new. They've been the subject of news articles, public hearings, admissions or lawsuits. They rehash the long-standing dispute over whether Rocky Flats should be covered by state environmental laws, and whether plant officials should have known that disposing waste without a permit would be deemed illegal.

But Stone is given credit by many for being among the first to claim that there was plutonium in the duct work.

"They said there couldn't possibly be plutonium in the ducts, but then they found it," Stone said Tuesday. Sixty-two pounds of plutonium is caked on several miles of

ductwork at the plant, which makes plutonium triggers for nuclear

(See **MANY, Page 3A**)

Many of whistleblower's claims aren't new

(from Page 1A)

weapons.

Attorney Hartley Alley said if Rockwell had listened to Stone's warnings in 1980 when he was a utility engineer, plutonium never would have built up in the air ducts. And, if the U.S. Department of Energy had listened, Rockwell may have been thrown out as contractor nine years earlier. EG&G Inc. replaced Rockwell as the main Rocky Flats contractor late last year, following a dispute over liability for breaking environmental laws.

The False Claims Act allows citizens to sue contractors for fraud, waste and abuse, and to do it on behalf of the government—in effect inviting the Department of Justice to join in the action.

The Justice Department estimates that fraud drains $12 billion to $120 billion from the annual federal budget, according to Bradford Penney, former counsel to the U.S. Senate committee on Foreign Relations.

But the Justice Department joins a lawsuit only in about one in six cases, a fact that Penney thinks is caused because U.S. attorneys are stretched too thin.

Since 1986 when amendments made it easier for clients to win suits, all the settlements combined have totaled about $70 million. Stone would receive 15 percent to 30 percent of the settlement, with the rest going to the federal government. Stone would like to see that money churned back into Rocky Flats' cleanup.

The government this summer recovered $17.9 million from Textron, after it made faulty engines for Coast Guard helicopters. The citizen initiating the suit, former Textron

buyer Robert Ballew, received $2.7 million, tax-free.

From July through September, the government recovered $37 million from Martin-Mariettta, Ford Aerospace, General Electric and VSI Corp.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-C-1154

UNITED STATES OF AMERICA ex rel.
James S. Stone,

Plaintiff,

vs.

ROCKWELL INTERNATIONAL
CORPORATION,

Defendant.

AFFIDAVIT OF JAMES S. STONE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

STATE OF COLORADO)
: SS.:
COUNTY OF JEFFERSON)

JAMES S. STONE, being sworn, states:

1. I am the *qui tam* plaintiff in this action. I am informed that defendant, Rockwell International Corporation ("Rockwell"), has filed a motion with the Court to dismiss my complaint on the ground that I allegedly am not an "original source" of the information on which my action is based. I further understand that, to be an "original source" under the False Claims Act, I must have direct and independent knowledge of information on which the allegations in this lawsuit are based. Because I have such knowledge and am an original source of the claims here, I submit this affidavit in opposition to Rockwell's motion.

Background

2. I am a registered professional engineer in several states including Colorado and had over 30 years engineering experience when I commenced my employment with Rockwell on November 10, 1980, as a Principal Engineer in Rockwell's Facilities, Engineering and Construction Division at the Rocky Flats Plant located in Golden, Colorado ("Rocky Flats"). In January of 1982, I was promoted to Lead Principal Engineer at Rocky Flats in the Utility Design Department, Facilities Engineering Division. I continued in that position until March 17, 1986, when my employment with Rockwell was terminated.

3. My duties during my six years at Rocky Flats included plant-wide "troubleshooting" and the review of designs and existing operations for safety and cost effectiveness. One of my main responsibilities was to identify plant engineering problems and recommend solutions to management. As a result, during my six-year tenure at Rocky Flats, I was assigned to numerous projects that required me to learn about, and recommend solutions for, various environmental, health and safety issues at the plant. Each project that I worked on was identified by a project number and involved a variety of tasks. I attach as Exhibit A a copy of the daily records that I personally kept during my employment at Rocky Flats. These records show the variety of tasks I performed at Rocky Flats. Each task is identified by the overall project number, and a short description of the specific task. As my daily time records show, and as I explain in greater detail below, many of my assigned tasks related to the claims at issue in this case, as organized and set forth in my Consolidated Answers to Discovery, dated October 27, 1992, and attached as Exhibit B, *i.e.*, claims involving surface and ground water contamination and waste treatment, storage and disposal; plutonium contamination; and beryllium health and safety

issues.[14] In the discussion that follows, I have cross-referenced, where appropriate, the pertinent responses set forth in my Consolidated Answers.

Ground and Surface Water Contamination and Waste Treatment, Storage and Disposal

4. During my employment at Rocky Flats, I obtained direct and independent knowledge of a number of different ground and surface water pollution problems and problems related to waste treatment, storage and disposal. The problems I discuss below in this general area can be divided into the following three general categories: (1) sewage treatment system problems related to toxic waste disposal; (2) spray irrigation; and (3) pondcrete/saltcrete.

5. One of my first projects at Rocky Flats was to review the design of the sewage treatment plant. The sewage treatment plant at Rocky Flats was intended to process *only* routine biological wastes. Nevertheless, as part of this assignment, I learned that the flows to the sewage treatment plant contained materials which indicated the presence of industrial wastes as well as biological wastes. The industrial wastes at Rocky Flats are very toxic. They are hazardous or radioactive, or a mixture of both, and may be in liquid or solid form. These wastes are generated as part of the Rocky Flats production of nuclear bomb

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[14] For example, among others, project numbers 308201, 315300, 315332, 325040, 325041, 329670, 338616, 345242, 345244, 365550, 379200, 420129, 420906, 430139, 430211, 430555, 430576, 430707, 440227, 440414, 460014, 460912, 460913 and 470247 include tasks involving ground water contamination, sewage treatment, solar ponds and related waste treatment, storage and disposal issues; project numbers 325063, 328957, 335614, 338601, 338611, 345252, 348342, 360456, 370373, 378029, 388611, 398017, 398138, 400204, 410109, 410300, 410301, 420205, 420219, 420305, 430527, 430601, 430642, 430900, 438139, 440219, 470214, 470304, 490006 and 550499 include tasks relating to gloveboxes, dump valves and plutonium in the air duct exhaust system; and project numbers 310072, 318109, 325056, 328955, 365634, 450003, 450010, 450125, 450917, 450918 and 460552 include tasks involving health and safety issues affecting workers at the beryllium shop.

triggers and processing of nuclear materials. I learned of the presence of toxic wastes in the sewage treatment system when I reviewed certain records which reflected a low rate of biological process at the treatment plant and the presence of certain chemicals and metals, both of which indicated the presence of toxic waste. (*See* Exhibit B, Attachment 1, Items 7 & 17)

6. I concluded from this that the toxic wastes that should not have been present in the flows to the sewage treatment plant were killing the bacteria needed to process the biological waste at the sewage treatment plant. I also learned that many of the process buildings at Rocky Flats had laboratory sinks and floor drains that were connected to the drainage system to the sewage treatment plant. In my view, there also may have been broken lines and cross-connections between the toxic and biological waste disposal systems, and infiltration of contaminated ground water. Based on this, I concluded that the flows to the sewage treatment plant included toxic wastes from throughout the plant. (*See* Exhibit B, Attachment 1, Items 7 & 17; *see also id.*, Items 8, 9, 10 & 16)

7. The second general area of ground and surface water problems that I worked on at Rocky Flats had to do with the storage, treatment and disposal of both liquid industrial wastes from Rockwell's plutonium operations and the liquid wastes from the sewage treatment plant. At Rocky Flats, these wastes were sent to "holding" and/or "evaporation" ponds for storage, treatment, and disposal. The holding ponds primarily received the outflow from the sewage treatment plant; the evaporation ponds directly received the toxic industrial wastes from plutonium operations. When the ponds could no longer hold the full amount of these liquid wastes, Rockwell disposed of the wastes by a method called "spray irrigation." Spray irrigation involves the transfer of wastes from the ponds to the grounds of Rocky Flats.

8. The use of spray irrigation to dispose of wastes from

the evaporation ponds resulted in the disposal of highly toxic wastes directly on the ground. The use of spray irrigation to dispose of treated biological wastes, by contrast, would not ordinarily be a problem. At Rocky Flats, however, the use of spray irrigation from the holding ponds also was problematic because the wastes being spray irrigated were not solely biological wastes, but contained toxic materials. As stated earlier, the outflows from the sewage treatment plant contained toxic as well as biological wastes. Thus, Rockwell used spray irrigation to dispose of toxic wastes as well as biological wastes. (*See* Exhibit B, Attachment 1, Items 15 & 16)

9. Rockwell's improper use of spray irrigation also likely led to ground water contamination. Soil absorption and evaporation can only eliminate a certain quantity of liquid. If that quantity is exceeded, the liquid will enter and contaminate the ground water. The spray irrigated wastes also increased the ground water flow at Rocky Flats, specifically through former hazardous waste burial sites. This likely increased the rate of migration of these highly toxic wastes. (*See* Exhibit B, Attachment 1, Items 11, 15 & 16)

10. In addition, the method of spray irrigation employed by Rockwell at Rocky Flats caused the runoff of the wastes into the creeks that serviced the Great Western Reservoir and the towns surrounding Rocky Flats. Rockwell spray irrigated tremendous quantities of liquid on very limited areas regardless of temperature, precipitation or other climate factors. Because of this, the ground was unable to absorb all of the liquid and, thus, runoff of the wastes into the neighboring creeks likely occurred. This was evidenced by the erosion of the slopes at Rocky Flats which I personally observed. For example, spray irrigation of wastes onto eroded or frozen ground often causes the wastes to run into the surface streams which flowed into lakes that supplied drinking water to residents of the towns surrounding Rocky Flats. (*See* Exhibit B, Attachment 1,

Items 11 & 16)

11. I explained to Rockwell management that spray irrigation from the holding and evaporation ponds was resulting in toxic wastes being sprayed on the ground, which could contaminate the ground water and surface streams at Rocky Flats. I told management that I thought there was a better way to dispose of the waste products that Rockwell was then spray irrigating. On December 1, 1980, I put some of my recommendations for an alternative irrigation method in writing. That document is attached as Exhibit C.

12. Rockwell management did not accept my recommendations and instead continued to spray irrigate and, in my view, contaminate the surface and ground water. I continued to voice my concerns about spray irrigation. It was my opinion that, sooner or later, the toxic wastes would find themselves in the ground water and the reservoirs downstream of Rocky Flats. I continued to be concerned with the ground water problems at Rocky Flats. Several years after my initial recommendation, on March 20, 1984, in connection with my suggestion that Rockwell retain me as a full-time engineering consultant, I stated that the ground water problems at Rocky Flats were "a latent time bomb." I attach a copy of that document as Exhibit D. My recommendations were not heeded; Rockwell continued to spray irrigate as before.

13. During the course of my work, I also learned about a third major problem which I thought affected the surface and ground water at Rocky Flats and the surrounding towns. As noted earlier, toxic industrial wastes were sent to evaporation ponds at Rocky Flats. Some of the liquid portion of these wastes either evaporated or was disposed of by spray irrigation. The remaining liquid and some solid wastes, or "sludge," remained in the ponds.

14. This sludge and remaining liquid needed to be disposed of in a non-hazardous manner. In or about October 1982, I was assigned to a project addressing the proper

manufacturing process for "pondcrete." Pondcrete is a mixture of cement with the sludge and liquid from the evaporation ponds to form large blocks. The blocks can be stored at Rocky Flats or shipped to other sites for disposal. In forming these blocks, it is necessary that the mixture be such that the blocks are stable and do not fall apart and contaminate the surrounding environment. As assigned, I studied aspects of the design proposed by Rockwell management for making pondcrete. After careful study, I concluded that the suggested process would result in an unstable mixture that would later deteriorate and cause unwanted release of toxic wastes to the environment. I also noted, based on my knowledge of the chemical processes at Rocky Flats, that the sludge and liquid present in the evaporation ponds contained some of the most toxic and radioactive substances at Rocky Flats, which made the unstable nature of the pondcrete particularly hazardous. (*See* Exhibit B, Attachment 1, Items 2 & 3)

15. I communicated my concerns about pondcrete to Rockwell management. On October 13, 1982, I told my superiors that the suggested design would not work. A copy of that communication is attached as Exhibit E. As is noted at the bottom of that document, my superior, Bob Jensen, concurred in my opinion. Despite its knowledge that the pondcrete would not be' stable and that dangerous toxins would be released into the environment, Rockwell went forward with the project without making the changes necessary (some of which I proposed) to eliminate the instability of the pondcrete blocks.

16. Rockwell also decided to use a waste mixing process similar to that proposed for pondcrete for forming "saltcrete." Saltcrete is a mixture of cement, salts and salt brine from liquid industrial waste treatment processes that is formed into large blocks. I knew from my general knowledge of the process that, like the solid wastes being stored as pondcrete, the saltcrete blocks also would have problems with deterioration. The saltcrete and other

wastes were treated and stored at several sites at Rocky Flats in anticipation of being shipped off-site. (*See* Exhibit B, Attachment 1, Items 1 & 4; *see also id.*, Items 5, 6, 12, 13 & 14)

Plutonium

17. In or about 1982, I was asked to design a new exhaust "plenum" for a building at Rocky Flats which Rockwell intended to convert from a process building into an office building. A "plenum" is a duct or large chamber that collects air from the exhaust system before it leaves the building. A primary purpose of the plenum is to filter the air before it is released into the atmosphere. As part of my analysis of the proposed design for the exhaust system for this proposed new office building, I reviewed the designs and exhaust systems of other buildings at Rocky Flats.

18. While working on this project, I realized that some of the ductwork connected to the plenum was contaminated with radioactive wastes. I knew that the ductwork was over thirty years old, and deduced from that fact that numerous substances from different operations might have accumulated in the ducts. The presence of numerous toxins over the years, in my view, necessitated that the ducts be removed or cleaned. (Exhibit B, Attachment 2, Items 7, 8, 9, & 10)

19. I explained this problem to the project engineer. (Exhibit F) I also reviewed the records of the health and physics department, which confirmed my findings. (Exhibit G) I learned, however, that only the plenum, and not the ductwork, was to be cleaned. I recommended that Rockwell clean the ductwork as well. I suggested that Rockwell use new air filtration technologies, rather than replace the plenum, and use the saved money to clean the ductwork. (Exhibit H) My suggestions were not followed. The building was designated a "clean" building and occupied for office and laboratory space, even with the contaminated ductwork.

20. I also discovered that in some buildings that were

used for plutonium operations, "gloveboxes" used by employees working on plutonium and related safety features were not working properly. Plutonium is radioactive and one of the most highly toxic substances known to mankind. A "glovebox" is an enclosure into which workers place their hands to work on the processes using plutonium in the manufacture of nuclear bomb triggers. It is intended to prevent spontaneous combustion and unnecessary exposure to plutonium particles. The gloveboxes are connected through a filtered exhaust system to the ductwork which in turn is connected to the exhaust plenum. A properly functioning glovebox will, among other things, prevent over-pressurization and therefore prevent plutonium particles from entering the workplace. Gloveboxes are used at Rocky Flats because plutonium is extremely dangerous and radioactive. It is crucial to worker safety, and potentially to public safety, that the gloveboxes work properly and have adequate filters and other safety features.

21. I learned during my tenure at Rocky Flats that many of the gloveboxes being used by the workers were leaking. When this occurs, the plutonium particles enter the air and workers are unnecessarily exposed to the dangerous material. In addition, when the particles are airborne, additional plutonium may enter the exhaust ductwork that leads to the exhaust plenum. I also learned that the gloveboxes lacked necessary filters or the filters were punctured by workers trying to protect themselves because the filters were clogged from overuse and lack of maintenance. (*See* Exhibit B, Attachment 2, Items 1, 3, 5, 6, 8, 9 & 10)

22. In addition, the "dump" valves that were supposed to protect workers by maintaining the proper pressure in the gloveboxes were malfunctioning or not functioning at all. "Dump" valves are safety devices that protect workers from exposure to plutonium particles in the event the gloveboxes malfunction. The dump valve is supposed to open when there is too much pressure in the gloveboxes. When the

dump valves do not work, plutonium particles can leak into the workplace and create unnecessary hazards for workers. The malfunctioning of the dump valves also may lead to an accumulation of plutonium in the ductwork. (*See* Exhibit B, Attachment 2, Items 2, 8, 9 & 10.) While at Rocky Flats, I recommended a way to prevent damage due to over-pressurization from the dump valves. (Exhibit I)

23. When I became aware of the failure of the dump valves to work properly, I reported that fact to my superior, Anthony Eden. At Mr. Eden's suggestion, we tested the dump valves. The test results confirmed that the valves were not working properly and had not been working properly for some time. (Exhibit J)

24. Perhaps most importantly, as part of my assigned projects at Rocky Flats, I concluded that the build-up of plutonium in the exhaust ducts created a danger to occupants of the building as well as to persons outside of the building. As stated earlier, I learned from my work in the various buildings that the gloveboxes, filters and dump valves were not working properly and that the equipment being used by workers was not cleaned or changed often enough. These discoveries, in my view, proved that the malfunctioning equipment and ineffective safety devices in the buildings at Rocky Flats created serious hazards. I realized that plutonium particles had likely accumulated throughout the ductwork of other Rocky Flat process buildings. (*See* Exhibit B, Items 1, 8, 9 & 10; *see also id.*, Item 4) Despite my findings, Rockwell did not, to my knowledge, undertake the necessary actions to abate these very significant hazards.

Beryllium

25. Beryllium is a unique material used in the manufacture of nuclear triggers for nuclear bombs. It is an extremely toxic metal, although it is not itself radioactive. Workers who are exposed to dangerous levels of airborne beryllium can contract the deadly lung disease berylliosis.

26. During my tenure at Rocky Flats, I was assigned to

a Rockwell project team to study the health and safety conditions in the beryllium machine shop and propose solutions. I was given this assignment after an employee contracted berylliosis. As part of this assigned project, I examined the environment of the beryllium machine shop and reviewed Rockwell's compliance there with health and safety requirements. Attached as Exhibit K is a document that I prepared outlining the criteria for the design of the air handling system of the beryllium machine shop.

27. As part of this work, I learned that the workplace environment of the machine shop was contaminated with hazardous levels of beryllium both in the air and on workplace surfaces. I also learned that the systems in the shop for distributing air and for monitoring the level of beryllium exposure were not installed or functioning properly and that, therefore, Rockwell's records did not accurately reflect the excessive levels of beryllium particles in the shop. In addition, excessive levels of beryllium particles were accumulating in the wrong places in the dust collection system servicing the beryllium shops. I suggested to management that the monitoring system be corrected and that a different method of machining be employed at the shop to prevent-excessive beryllium particles from entering the air. Again, my suggestions were not heeded. (*See* Exhibit B, Attachment 3, Items 1-5)

Rockwell's Contract with the United States

28. As a Rockwell employee, I was aware that Rockwell was operating Rocky Flats under a lucrative contract with the United States. I understood then that, under its contract with the United States, Rockwell could and did earn substantial "bonuses" every six months for its operations of the plant. Indeed, periodically during my employment at Rocky Flats, I received copies of documents describing the award fee determination process under which Rockwell could earn these bonuses. I attach as Exhibit L one of the documents that I received while employed at

Rocky Flats which explains part of the process.

29. I also learned during my employment at Rocky Flats that, under its contract with the United States, Rockwell was required to operate Rocky Flats in accordance with federal, state and local environmental, health and safety laws. In addition, I learned that Rockwell's compensation under its contract was based in part on Rockwell's satisfactory performance in various subject matter areas, including "Environmental Protection" and "Waste Management." In fact, page 2 of Exhibit L lists those performance areas that Rockwell had to satisfy in order to receive an award fee under the contract for the period in question. I understood, based on documents like Exhibit L, that Rockwell would not even be considered for an award fee if it did not perform at least at a satisfactory level in each of the applicable performance areas.

I Voluntarily Provided Information to the Government on Matters at Issue in This Case

30. While employed at Rocky Flats, I was told by my superiors that I should not discuss the environmental, health and safety problems that I was discovering with representatives of the Department of Energy or any other agency of the government. I followed these instructions.

31. Soon after the termination of my employment with Rockwell in March 1986, I approached the Federal Bureau of Investigation ("FBI") about some of the environmental, health and safety problems described above as well as a number of other problems at Rocky Flats. I was introduced to FBI Special Agent Jon S. Lipsky by an acquaintance of mine, named Bonnie Exnor. I first met with Mr. Lipsky at Ms. Exnor's office in the summer or fall of 1986. At that initial meeting, I described some of the matters outlined above in addition to other matters concerning Rocky Flats that are not at issue in this case. I subsequently met on at least three other occasions with Mr. Lipsky and representatives of the Environmental Protection Agency

("EPA"), and on one occasion with an Assistant United States Attorney. I also spoke by telephone on several other occasions with Mr. Lipsky. In addition, I provided the FBI with over 2,300 pages of documents. Further, I provided the FBI with the names of individuals with likely knowledge of Rockwell's environmental, health and safety compliance activities as well as recommendations as to where at Rocky Flats the FBI might best locate additional relevant documents and other evidence.

32. To my knowledge, the FBI recorded some of our discussions. I had other discussions with the FBI that, to my knowledge, were not recorded, including my initial meeting in Ms. Exnor's office and some of my telephone conversations with Mr. Lipsky.

33. The FBI reports that I have of my discussions with representatives of the government document some, but not all, of the matters that I reported to them. I attach as Exhibit M a report by FBI Special Agent Jon S. Lipsky summarizing aspects of my June 25, 1987 meeting with Mr. Lipsky and EPA Agent William F. Smith. As that report indicates, during the June 1987 meeting I voluntarily provided information to the government concerning a number of matters on which this lawsuit is based, including matters involving ground water contamination, waste treatment and beryllium exposure.

34. I attach as Exhibit N an FBI report of my February 17, 1988 discussion with FBI Special Agent Lipsky, EPA Agent Smith and Assistant-United States Attorney Ken Fimberg. Among other things, at that meeting I discussed my safety concerns about the Rocky Flats beryllium shop and the contaminated ducts. In addition, I attach as Exhibit O further documentation by the FBI recording certain of our telephone conversations and written communications concerning matters at issue in this lawsuit.

35. All of the information that I provided to the FBI and other government representatives was based upon my

direct and independent knowledge, gained while I was an engineer at Rocky Flats working on matters that are now at issue in this lawsuit. I did not obtain the information outlined in this affidavit from news reports or reports of outside government investigations. Rather, I obtained the information outlined above by personal observation and in connection with my assigned projects at Rocky Flats to analyze these problems and propose solutions. The information I possess on the matters described in this affidavit is direct and independent of any public documents or news reports.

36. In August 1986, after the termination of my employment at Rockwell, I filed a civil complaint against Rockwell for breach of contract in state court in Jefferson County, Colorado. In that complaint, which I attach as Exhibit P, I included, among other things, some of the allegations concerning Rockwell's environmental violations involving wastewater, beryllium and plutonium (pp. 6, 9) that are presently at issue in this lawsuit (*see* Exhibit B).

37. Finally, simultaneously with the filing of this lawsuit, I submitted to the government a detailed Disclosure Statement. I attach as Exhibit Q a copy of my Confidential Disclosure Statement of Material Evidence and Information. As I state in that document (pp. 9-17, 19-20, 23-30), I voluntarily provided the government with information about which I had direct and independent knowledge on the surface and ground water, plutonium and beryllium allegations in this case. As the Disclosure Statement also states (pp. 24-30), I simultaneously provided the United States with four boxes of documents about matters at issue in this case about which I have direct and independent knowledge. I continued to supplement my Disclosure Statement by providing additional documentation to the government subsequent to its filing, and prior to the unsealing of this lawsuit.

38. In my Consolidated Answers to Discovery (Exhibit B), I summarized the factual bases of my claims in

this action. Based on my work history at Rockwell, as described in part above, I have direct, independent and personal knowledge of the facts underlying each of the environmental, health and safety problems set forth in my Consolidated Answers. The material outlined in this affidavit, however, is not all-inclusive of the matters about which I have direct, independent and personal knowledge from my employment at Rocky Flats.

Conclusion

39. For the foregoing reasons, I respectfully request that Rockwell's motion to dismiss my complaint be denied.

/s/ James S. Stone
James S. Stone

Sworn to before me this
27th day of February, 1993

/s/ Cynthia M. Annett
Notary Public
My commission expires February 24, 1996 [SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

RECEIVED
OCT 29 1992

Case No. 89 C 1154

UNITED STATES OF AMERICA *ex rel.* and James S. Stone,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL CORPORATION, a corporation

Defendant.

PLAINTIFFS' CONSOLIDATED ANSWERS AND RESPONSES TO DISCOVERY

The Plaintiff, James S. Stone, by and through their attorneys, HARTLEY DAVID ALLEY; BUCHANAN, GRAY, PURVIS AND SCHUETZE; McDERMOTT, HANSEN AND REILLY; and BREIT, BEST, RICHMAN AND BOSCH, P.C., pursuant to the direction of Bruce D. Pringle, United States Magistrate Judge, respectfully submits the Plaintiffs' Consolidated Answers and Responses to the Defendant's First Interrogatories and Request for Production. The Plaintiffs' Answers and Responses are attached hereto as Attachments 1, 2, 3 and 4.

This submission while not exhaustive as to the subject matter represents counsel's best effort to comply with the Magistrate's Order and is the product of substantial time and effort devoted to compiling this submission. Numerous documents are identified by category as opposed to identification with minute specificity. Upon the Defendant's

production of additional requested documents and Plaintiffs' counsel's opportunity to review requested documents, Plaintiffs will supplement these consolidated answers by providing greater precision in regard to documents endorsed generally here.

Further, while Plaintiff has listed individuals who may be knowledgeable in compliance with the Magistrate's Order, it is likewise believed this list is not exhaustive and that additional knowledgeable individuals may be identified either in documents provided in ongoing discovery or in depositions.

* * *

STAT., REG., OR CONTRACT TERM VIOLATED	FACTUAL BASIS	DOCUMENTS	INDIVIDUALS	NEXUS
ITEM 1 42 U.S.C. § 6928(d) (2)(c) Criminal Count 1	Rockwell knowingly stored saltcrete, a mixture of cement, salts, and salt brine, produced from building 374 liquid waste treatment processing operations, in violation of RCRA interim status regulations and Colorado Hazardous Waste Regulations 6 C.C.R. 1007-3 § 265.31, which required Rockwell to maintain its interim status facilities in such a way as to minimize the possibility of an	Plea Agreement 92-CR-107	John McNett, Esq.	Contract AT (29-2)-3533, originally dated June 30, 1975, especially article XVII, P.56. This provision requires that the contractor (Rockwell) shall procure all necessary permits and abide by all applicable laws and regulations of the United States and of the state in which the work under the contract

	unplanned sudden or non-sudden release of hazardous wastes to air, soil, or water..." Rockwell pled guilty to a felony violation of this statute in Count 1 of 92-CR-107, for knowingly storing saltcrete blocks on the 904 Pad on June 6-15, August 1-10, and December 5-14, 1988 and on June 1-10, 1989, and for knowingly storing saltcrete blocks on the 750 Pad on June 15-24, September 11-30, December 7-16, 1987, and February 15-24, May 6-25, July 18-27, September 14-23, 1988, and Febru-			is performed. Rockwell was not legally entitled to claim or receive payments for performance under this Contract if Rockwell's performance was not in compliance with its duties and obligations under the contract and in violation of the contract terms and of applicable laws and regulations, whether the payments were for purportedly "allowable costs" or a

	ary 6–15, 1989. Stone was an original source of information leading to the government's search of the RFP, and Stone had encouraged the FRI to check out the storage of pondcrete because he predicted, based upon his knowledge of the plan, that the mix would have an improperly high liquid content and the end product would be unstable and subject to deterioration.			"fixed fee", Or a "base fee", or an * * *

* * *

STAT., REG., OR CONTRACT TERM VIOLATED	FACTUAL BASIS	DOCUMENTS	INDIVIDUALS	NEXUS
ITEM 2 42 D.C.S. § 6928 (d) (2)(c) Criminal Count 1	Rockwell knowingly stored pondcrete, a hazardous waste mixture of cement and sludge from solar pond 207A in violation of RCRA Interim Status Regulations and Colorado Hazardous Waste Regu-lations 6 C.C.R. 1007–3 § 265.31, 6 C.C.R. 1007–3 § 265.173, 6 C.C.R. 1007–3, § 265.15(c), 6 C.C.R. 1007–3, § 265.171. Stone learned of the solar pond sludge removal conceptual plan from Fong and Eng. Stone spoke to	Plea Agreement 92–CR–107	Leon Fong Lou Eng Rex Gaskins J. Direcchi M. Maas Bob Jensen John McNett, Esq.	See Item 1

	them also and expressed his concerns about the methodology selected and warned of erratic stability absent batching the pondcrete to establish the needed solidity of the product. As Stone warned, the product was frequently not solid and prone to deterioration. Rockwell pled guilty to a felony violation of this statute in Count 1 of 92–CR–107, for knowingly storing pond-crete blocks on the 750 Pad on June 15–24, September 11–30, December 7–16, 1987, February 15–24. May 6–25, July 18–27, September 14–23, 1988,			

	and February 6–15, 1989, and for knowingly storing pondcrete blocks on the 904 Pad on June 6–15, August 1–10, and December 5–14, 1988 and June 1–10, 1989.			
ITEM 3 42 U.S.C. § 6928 (d) (2)(A) Criminal Count 2	Rockwell knowingly stored pondcrete, mixture of cement and solar evaporation pond sludge from solar pond 207A, without a RCRA Permit or Interim Status. Stone studied the concept for solar pond sludge removal (Stone Doc. 276) and informed Fong and Eng that the concept would not work as conceptualized. Stone was aware the project went	Stone Document 276 Plea Agreement 92–CR–107 All relevant documents re: Project #402096	Leon Fong Lou Eng John McNett, Esq.	See Item 1

	forward anyway, despite his critique. Stone knew, from the plans which he saw, that the mixture would be unstable, i.e., too liquid. Rockwell pleaded guilty to felony violation of this statute in Count 2 of 12–CR–107 for knowingly storing pondcrete on the 904 Pad without a required RCRA Permit or Interim Status on October 5–9, November 16–20, and December 14–18, 1997, and January 18–22, February 22–26, March 21–25, April 18–22, and May 16–20, 1988.			

* * *

STAT., REG., OR CONTRACT TERM VIOLATED	FACTUAL BASIS	DOCUMENTS	INDIVIDUALS	NEXUS
ITEM 7 33 U.S.C. § 1319(c) (1)(A) Criminal Count 5	Rockwell pled guilty criminal conduct in violating conditions and limitations of the RFP NPDES Permit dated November 26, 1984, by discharging and releasing toxic hazardous substances to RFP's sewage treatment plant on August 10-19, November 12-21, 1987 March 7-16, April 11-20, May 9-18, and November 9-18, 1988. This plea occurred in 92-CR-107.	Plea Agreement 92-CR-107	John McNett, Esq.	See Item I. Contract AT (29-2) – 3533 originally dated June, 1975, and especially Article XVII, P. 56, Modification 2 thereof, especially ¶ 2-d (p. 18), Modification 87 thereof, especially ¶ 16 (p. 25).

	This conduct is a continuation of conduct described in Items 16 and 17 below, which was described by Stone to the FBI commencing in 1987.			
ITEM 8 33 U.S.C. § 1319(c)(1)(A) Criminal Count 6	Rockwell pled guilty to criminal conduct in violating the RFP NPDES Permit by discharging water from the B-3 Pond which exceeded permit limits for 5-day Bio-logical Demand (BOD-5) and/or fecal coliform on March 1, 15, and 30, 1988. This plea occurred in 92-CR-107. This conduct is continuation of conduct	Plea Agreement 92-CR-107	John McNett, Esq.	See Items 1 and 7

	described in Item 16 below, which was described by Stone to the FBI commencing in 1987.			
ITEM 9 33 U.S.C. § 1319(c)(1)(A) Criminal Count 7	Rockwell pled guilty to criminal conduct in violating the RFP NPDES permit by discharging water from the B-3 Pond which violated the BOD-5 and fecal coliform limits on April 1, 8, 12, 16, 20, and 30, 1988. This plea occurred in 92-CR-107. This conduct is continuation of conduct described in Item 16 below, which was described by Stone to the FBI commencing in 1987.	Plea Agreement 92-CR-107	John McNett, Esq.	See Items 1 and 7

ITEM 10 33 U.S.C. § 1319(c)(1)(A) Criminal Count 8	Rockwell pled guilty to criminal conduct in violating the RFP NPDES Permit by discharging water from the B-3 Pond which violated the BOD-5 limits on May 1, 15, and 30, 1988. This plea occurred in 92-CR-107. This conduct is continuation of conduct described in Item 16 below, which was described by Stone to the FBI commencing in 1987.	Plea Agreement 92-CR-107	John McNett, Esq.	See Items 1 and 7

STAT., REG., OR CONTRACT TERM VIOLATED	FACTUAL BASIS	DOCUMENTS	INDIVIDUALS	NEXUS
ITEM 11 33 U.S.C. § 1319(c)(2)(A) Criminal Count 9	Rockwell pled guilty to the felony charge of knowingly violating the conditions and limitations of the RFP NFDES Permit by spray irrigating B-3 pond water contrary to good engineering practices and bypassing RFP facilities necessary to maintain compliance with the plants NPDES Permit at the discharge point from pond 8-3 to the B-4 Pond and was not controlled or monitored.	Plea Agreement 92-CR-107	John McNett, Esq.	See Items 1 and 7

	Rockwell was aware that its spray irrigation practices irrigated more effluent from pond B-3 than the East Spray Field had capacity to properly dispose of by evaporation and infiltration. Rockwell spray irrigated when the spray fields were saturated, during sub-freezing temperature, at night, and while snow and ice were on the ground; Rockwell also spray irrigated over and adjacent to the waste disposal sites known as the East Trenches which contain approximately 275,000 pounds of Uranium-			

	contaminated drums and volatile organic compounds, sending large quantities of waste water into the waste disposal area. This conduct occurred on May 18, June 19, July 9, 10, and 22, August 4, November 15, December 4, 8, 9, and 25, 1987; January 4, March 2, April 22, May 19-20, November 14, and December 2, 9, 15, and 27, 1988; January 7, February 1, 2, 8, 13, 20, and 25, March 4, 9, 28, and 30, April 11 and 21, May 10, 25, and 31, and June 5, 15, and 23, 1989. This plea occurred in 92-CR-107. This conduct is a			

	continuation of conduct which Stone first observed in November, 1980, and continuously throughout his employment at RFP.			

* * *

STAT., REG., OR CONTRACT TERM VIOLATED	FACTUAL BASIS	DOCUMENTS	INDIVIDUALS	NEXUS
ITEM 13 42 U.S.C. §6928 (d) (2)	Rockwell knowingly stored liquid hazardous waste, i.e., salt brine and solar pond sludge, in solar evaporation ponds 207 A, B, and C without RCRA Permit or Interim Status. This conduct was continuous, dating from prior to Stone's employment at RFP in November, 1980, and continuing until at least March, 1986, and perhaps later. Stone's knowledge of the constituents of the process waste stream	Stone Docs. #7 & #276 SAR for Bldg. #374 Quality Assurance Manual for Bldg. 374 Assay Sheets for Bldg. 374 Waste Slurry Chemical Analyses of Salt	Rex Gaskins Bob Jensen Leon Fong Sam Cerise Al Krisnar Chuck Rose	See Item 1

	from Building 374 is detailed in Item 12. Stone personally traced the process waste pipeline from Building 374 to the solar evaporation ponds in May and June, 1982, and thus confirmed what he had been told by Gaskins, Jensen, and perhaps others, about the outflow routing of the Building 374 liquid hazardous waste to the 207 solar evaporation ponds. Stone also studied mappings of nitrate leeching from the solar ponds, referenced as Stone Document #7. Stone also learned of	Brine for the 207 Solar Ponds Documents listed in Item 12 All relevant dots. Re: Job/Project #'s 900427, 420906, 338616, 315300, 900402, and 440414 C.E.A.R.P. Phase 1, April 1986, especially V.A.3.h, p. V-19 thereof C.E.A.R.P., phase 2, July	

	the functions of the solar evaporation ponds in discussions with Gaskins and Jensen commencing in November, 1980, and from Leon Fong in approximately October, 1982, when he studied materials concerning the solar evaporation pond sludge removal design criteria. During this period, Stone also learned that a trench system pumped pond leakage and contaminated groundwater back into the 207 ponds. Stone reviewed chemical analysis of the salt brine and the Pond sludge	1986, especially table 2.4 thereof		

	in the 207 solar evaporation ponds which confirmed that these ponds stored liquid hazardous waste as defined by RCRA. These documents were provided to Stone by Fong. Fong told Stone that the solar pond sludge was hazardous waste in October, 1982, which confirmed again what Stone had learned commending November, 1980, from written material described in the preceding item and in conversations described therein also.			

STAT., REG., OR CONTRACT TERM VIOLATED	FACTUAL BASIS	DOCUMENTS	INDIVIDUALS	NEXUS
Item 13 continued	Stone regularly observed the 207 solar evaporation ponds, and from his personal observations he could tell the ponds remained full despite evaporation uptake, indicating that replenishment was ongoing. Stone walks also aware that the only function of the 207 solar ponds, was to was to evaporate process waste, and that these ponds were the end point for	C.E.A.R.P., Appendix A, July 21, 1986, especially Tables IV, 1 and 3 Closure Plan, Solar ponds Evaporation Ponds, Aug. 29, 1986, especially . §1.2.2 thereof Closure Plan, Solar		

	liquid process waste at RFP that was not otherwise stored or treated. Stone knew the basic production and treatment processes at the RFP did not change during his tenure, and that pipe routing remained the same. Stone personally inspected all aspects of the piping and process waste distribution system approximately once every three months throughout his employment at RFP and the process waste distribution system from and including the function of Building 374 to and including the 207 solar	Evaporation Ponds, July 1, 1988	

	ponds remained unchanged throughout Stone's employment at RFP. From discussions with the long tenured employees at RFP listed and review of the described documents, Stone learned these process techniques have remained essentially unchanged for many years, all of which demonstrate the continuity and ongoing nature of the storage of salt brine and solar pond sludge in the 207 solar ponds.			

STAT., REG., OR CONTRACT TERM VIOLATED	FACTUAL BASIS	DOCUMENTS	INDIVIDUALS	NEXUS
ITEM 14 42 U.S.C §6928(d)(2)	Rockwell knowingly treated liquid hazardous waste in solar evaporation ponds 207 A, B, and C, without a RCRA Permit or Interim Status. This conduct was continuous, dating from prior to Stone's employment at RFP in November, 1980 to at least March 1986, and likely later. Stone's knowledge of some of thee sources of contribution to the 207 ponds is detailed in items	See documents listed in Item 13	See individuals listed in Item 13	See Item 1

	12 and 13 above. Stone learned from these sources and others that one purpose of the solar evaporation ponds was to evaporate liquid process waste. This evaporation treatment process was continuous, in that the evaporation uptake was replenished constantly from Building 374 and other sources. A second function of the solar evaporation ponds 207 A, B, and C was settling of colloidal suspensions or precipitants within the liquid hazardous waste salt brine. This treatment process was also ongoing and			

	continuous, and Stone regularly observed both of these processes operating throughout his employment at RFP.			

STAT., REG., OR CONTRACT TERM VIOLATED	FACTUAL BASIS	DOCUMENTS	INDIVIDUALS	NEXUS
ITEM 15 42 U.S.C. §6928(d)(2)	Rockwell knowingly disposed of liquid hazardous waste, i.e., salt brine from 207 solar evaporation ponds A, B, and C. without a RCRA Permit or Interim Status by spray irrigation. Immediately after being employed in November, 1980, Stone, commenced work on dispersal pumping of salt brine from the 207 solar pond. to spray fields. On approximately December	All documents listed in Item 12 and 13 All relevant docs. re: Job/ Project #'s 900179, 315300, 315332, 900427, 420906, 338616, 900402, 440414 Stone document #'s 4 through 11, 410	Bob Jensen Chuck Rose Sam Cerise Bill Nichol Leon Fong Al Krisnar Tony Eden	See Item 1

	10, 1980, Stone told Jensen and Rose that it was clear from what he had read and studied that the spray fields pumping operation from the 207 ponds was putting hazardous waste on the ground. Stone raise the issue many times with Jensen and Carise, including noting the "time bomb" nature of the RFP groundwater problem (Stone doc. #410). He received no response. The pumping to west spray fields continued to operate through at least 1985, and ran virtually daily, pumping salt brine	US DOE Rocky Flats RFP. Repository Document RP-938 re: West Spray Field as historic release point Reconstruction of Historical Rocky Plats Operations & Identification of Release Points, Project Take 3& 4, Final Draft Report, by ChemRisk for the Colorado		

	which was sprayed on the ground. The system had begun in reduced fashion approximately the time Stone was hired at RFP, November, 1980, and was greatly expanded commencing approximately January, 1982. About once every three months throughout his employment at RFP Stone verified that the source of the west spray field salt brine was the 207 solar evaporation ponds. The source of Stone's knowledge about the hazardous waste character of the salt brine	Department of Health, August 1992		

	from the 207 solar ponds was detailed above in Items 12 and 13.			

STAT., REG., OR CONTRACT TERM VIOLATED	FACTUAL BASIS	DOCUMENTS	INDIVIDUALS	NEXUS
ITEM 16 33 U.S.C. 51319(c) (2)(A)	Rockwell knowingly violated conditions and limitations of the RFP NPDES Permits by spray irrigating water from the B-4 pond and from the 207 ponds contrary to good engineering practices, without required monitoring and by by-passing monitoring facilities necessary to maintain compliance with the ATP NPDES Permit. This conduct was ongoing and	Stone Doc. #22 and #25 RFP Utility Dept. test records of STP flow and quality Bldg. 881 lab test results of STP influent and effluent contamination RFP Utility	Al Krisnar Chuck Rose Bob Jensen Sam Cerise Ken Shirk Leon Tong Tony Eden	See Items 1 and 7

	continuous from at least as early as 1981, and perhaps earlier, until the end of 1985, and perhaps later. Stone's sources of knowledge as to the operation of the 207 Ponds is detailed in Items 12 and 13. In November, 1980, Stone commenced work on the nitrate waste irrigation project. During the course of this project, Stone learned from numerous source. that sewage treatment plant effluent was being pumped to Pond B-3 and then to the west spray field and sprayed on the	Dept. records of hazardous waste processing of STP sludge All does. listed in Items 12, 13, and 15 C.E.A.R.P., phase 1, Installation Assessment April, 1986, especially §V.B.2.e.		

	ground. These sources were discussions with Krisnar, Nichol, Jensen, Cerise, and others, as well as Stone's review of RFP utility department re-cords of the sewage treatment plant sewage flow and sewage quality test results. Stone found that documented BOD levels showed that the sewage treatment plant biological process was low, in-dicating a serious influent contamination problem was killing the bacteria which process biological waste at the RFP sewage treatment plant, and that			

	the extraneous influent was approximately 50%. Tests Conducted In the lab in Building 881 and at the sewage treatment plant showed clearly that there was high influent contamination problem, which Stone original attributed to broken sewage lines being infiltrated by process waste contaminated ground water. Stone reviewed RFP utility department records and learned that sewage treatment plant sludge was processed as hazardous waste. The lab reports Stone inspected from RFP Utility			

	Department and Building 881 Lab, as well as numerous materials he inspected at the RFP Library, showed that there was a high affluent contamination problem. Stone reviewed RFP utility department records and learned that sewage treatment plant sludge was processed as hazardous waste. The lab reports Stone inspected from RFP Utility Department and the sewage treatment plant showed that the sludge was commonly found to contain process waste substances including chromium, cadmium, and			

	other metals used in RFP operations. Despite Rockwell's knowledge of the character of the salt brine in the 207 evaporation ponds and the biological and process waste character of the liquid in the B-3 pond, Rockwell commenced spraying the west spray field utilizing liquid from each of these ponds. In so doing, Rockwell bypassed the B-3 pond outfall measurement necessary to maintain compliance with the RFP NPDES permit. Stone personally reviewed the design criteria for Rockwell's			

	nitrate waste's irrigation project. He pointed out to Rockwell evaporation uptake, he compared the spray irrigation concept to a disposal trenching system, and he proposed the disposal system be placed to the north of the plant, away from known hazardous waste burial sites. He pointed out to Krizner and Jensen that spraying pond 207 and pond B-3 liquid on the ground west of the plant would add to the groundwater, which prior studies had shown migrated west to east. Stone pointed out that			

	adding to ground water flow would exacerbate the plant's groundwater problem as the enhanced groundwater flow would pass through the plant, where extensive hazardous waste burial sites were known to exist. Stone's plan was rejected, and liquid waste from pond 207 and B-3 was pumped to the west spray field and onto the ground. This spraying operated virtually continuously throughout Stone's tenure at RFP, placing substantially greater volumes of liquid waste on the west spray field			

	than could be evaporated or disposed of by soil absorption or plant uptake and contaminating ground water.			

JA-224

ENGINEERING CALCULATION SHEET

PROJECT Nitrate Waste Irrigation — PROJECT NO 315332

BY Jim Stone

To: Al. Kriznak w/copy to Bob Jensen — DATE 12-1-80

CALCULATION:_____ — SHEET 1 of 3

[Handwritten Text]:

COMMENTS ON DESIGN CRITERIA:

1. THE IRRIGATION SYSTEM SHOULD BE LOCATED IN THE AREA NORTH OF THE 207 PONDS & THE PSZ FOR THE FOLLOWING REASONS:
   a) LESS ENERGY & COST DUE TO SHORTER DISTANCE BETWEEN SOURCE OF WASTEWATER & DISPOSAL AREA.
   b) THE AREA SHOULD BE CULTIVATED IN ORDER TO UTILIZE THE EXISTING NITROGEN TRAPED IN THE SUBSOIL & TO STABILIZE THE SLOPES AGAINST EROSION.
   c) THE AREA IS DOWN-GRADE FROM THE PONDS & CAN BE SERVED BY GRAVITY WITH A SIPHON SYSTEM.
   d) THE AREA IS DOWN-WIND FROM THE ROCKY FLATS FACILITY.
   e) THE AREA IS NOT SUITABLE FOR OTHER PURPOSES, SUCH AS FUTURE EXPANSION OF THE ROCKY FLATS FACILITY.
2. THE IRRIGATION SYSTEM SHOULD BE A GRAVITY FED DISPERSAL TRENCH SYSTEM FOR THE FOLLOWING REASONS:
   a) THE GEOLOGICAL FORMATION & THE SOIL TEXTURE IS SUITABLE FOR A SHALLOW TRENCH SYSTEM TO DISPERSE THE WASTEWATER INTO THE ROOT ZONE

UNIFORMLY.

b) THE SYSTEM CAN BE OPERATED YEAR-AROUND & IS MORE DEPENDABLE THAN A MECHANICAL SPRINKLER SYSTEM.

c) THE SYSTEM HAS LESS OWNING & OPERATING COSTS.

d) THE SYSTEM IS MORE ADAPTABLE TO THE UNIQUE WIND CONDITIONS AT ROCKY FLATS.

e) THE SYSTEM MEETS THE CRITERIA ESTABLISHED BY THE ENVIRONMENTAL & SAFEGUARDS/SECURITY DIVISIONS.

3. REFERENCES:

a) DRAWING – "NITRATE WASTE IRRIGATION #SK-315332-DC-1"

b) "A SUPPLEMENTARY REPORT TO AN ENGINEERING STUDY FOR WATER CONTROL & RECYCLE CONCERNING THE RECOVERY OF NITRATE LADEN GROUNDWATER" BY ENGINEERING-SCIENCE, INC.

c) "SOIL INVESTIGATION (PSZ)" BY CTL/THOMPSON, INC.

d) "20' WIND ROSE – ROCKY FLATS" BY AEC

e) "FREEZE INDEX – USE OF CLIMATIC DATA IN DESIGN OF SOILS TREATMENT SYSTEMS, BOULDER, CO." BY NO & AA

f) "DESIGN MANUAL – LAND TREATMENT" BY EPA 625/1-77-008

g) "CALCULATIONS – AREA REQ'D" BY J. STONE (SHTS 2 & 3)

JA-226

March 20, 1984

Sam Cerise, Manager
F.E. & C. Design Div.
Rockwell International

Dear Sam:

As a follow-up to our meeting on Monday morning and pursuant to a suggestion by my supervisor, Bob Jensen, I propose that you create a position for an in-house engineering consultant, under your direct supervision, and let me fill it. The work would include special studies, the review of A/E design work and technical assistance to design and project engineers.

An indication of the current need is as follows:

1. Emergency Engineering - these are not on the DPL:

a) Maintenance space needed in the L.A. shop by May 15, 1984.

b) B881 computer room cooling for this summer - S & W will not complete planned work until September 1984.

c) B123 contingency plan to keep the labs in operation. ARIX will not have the plans, much less the work, completed by this summer.

d) ECON projects to meet need for current fiscal expenditure:
B371 - Cooling of 11 control rooms
B443
B~~334~~ - Piping modification to test, gas valves.

e) Equipment purchases in less than the regular 120 days delivery.

2. "State of the Art" Engineering Concepts:

a) B707 Facility redundancy - we must be first in this competition.

b) Ground water control and utilization - this is a latent time bomb.

c) Product improvement by an alternate inert environment.

3. Review A/E Design Work - recent failures:

a) B123 HVAC work which omitted lab make-up air and heating.

b) B850 Fire Protection piping with design water velocity at 32 ft./sec.

4. Engineering man-hours and scope of work estimates for A/E negotiations in mechanical, chemical, civil and environmental engineering.

5. Interface between working engineers and computer technology in design and project scheduling in order to facilitate Jeff Haberl's work.

The above situations are only those which have occurred recently. They represent a great challenge and opportunity. I try to accommodate these needs between my regular duties, but we are losing ground. I should be on this full time. Thanks for your consideration.

/s/ James Stone

Stone 10-3-82

ENGINEERING ORDER

TYPE OF ACTION	REVIEW	FINAL
ENGINEERING DRAWINGS	☐	☐
CONCEP. DES. REPORT	☐	☐
DESIGN CRITERIA	☒	☐
REQUEST FOR DIRECTIVE	☐	☐
OTHER ( )	☐	☐
PROCUREMENT SPECS.	☐	☐
DESIGN DOC.-TITLE I/II	☐	☐
PROCUREMENT	**IND**	**PURCH.**
SPECS. AND/OR DWGS	☐	☐
CONSTRUCTION	**ORIG.**	**ADDENDUM**
ISSUE	☐	☐

FUTURE CHANGES TO DWGS. AS REFLECTED ON E.O. ☐

OTHER ACTION SPECIFY ☐

TYPE OF FUNDING
LI ☐ GPP ☐ CEP ☐ WPAS ☐ EXP ☒

TYPE OF CONSTRUCTION
MAINT ☐ OPF ☒
FIXED PRICE CONTACT ☐

QUALITY ASSURANCE LEVEL
I, IA, (II, IIA, OR III) (CIRCLE ONE OR MORE)

INSPECTION REQUIRED
SOURCE YES ☒ NO ☐
RECEIVING YES ☒ NO ☐
CONSTRUCTION YES ☒ NO ☐

REFER TO EO NO.

EO RELEASE DATE 10-4-82

INITIATOR A. L. KRIZNAR EXT 69-2722 DATE 9/22/82

PROJ. ENGR. A. L. KRIZNAR EXT. DATE

FUNCT. MGR. R. J. Ruiz EXT. 2106 DATE 9-30-82

F.O.A. Al Watson EXT. DATE 9/29/82

E.O. COORDINATOR M. J. Quinn EXT. 2505 DATE 10-1-82 3:30 PM

DISTRIBUTION	BLDG	EO	DWG	DOC	PR
INITIATOR		1	1	1	
PROJ ENGR / AREA PROJ. ENGR					
PROJ MGR R. GASKINS	770	1	1	1	
MGR J. DIROCCHI	770	1	1	1	
MGR M. MAAS	774	1	1	1	
FAC MGR					
PD&A MGR		1	1	1	
PE&C MGR		1	1	1	
COST ENGR MGR		1	1	1	BY PE
MBAS COORD		1	1	1	
BLDG SUPT					
SE&C		1	1	1	
PLANT PROTECTION		1	1	1	
UTILITIES MGR		1	1	1	
UTILITIES AREA MGR					
MAINT MGR		1	1	1	
MAINT ADM SUPPORT					
MAINT AREA MGR					
FAC ENGR ADMIN	ENGR	1			
PURCHASING					DIR
DEN ACCTG					
FAC PROJ ENGR MGR		1	1	1	
CONST PROJ ENGR MGR		1	1	1	
EQUIP PROJ ENGR MGR					
FAC DESIGN ENGR MGR		1	1	1	
FAC ELEC DES MGR		1	1	1	
ESCO DES MGR					
POWER ENGR		1	1	1	
UTIL & CIVIL DES MGR		1	1	1	
CHEM PROC DES MGR		1	1	1	
LOW ENG		1	1	1	
SOURCE INSPECTION					
RECEIVING INSPECTION					
ENERGY ENGR		1	1	1	
DEN MGR (TRANS LTR ONLY)					
WASTE MGT MGR		1	1	1	
BDT					
BLDG OPER DIR					
SEISMIC ANALYSIS					
INDUSTRIAL ENGR		1	1	1	
FILTER SYS MGR					
AREA SAFETY REP					
TECHNICAL SECURITY					
EO COORDINATOR		1			
TOTAL NO. OF COPIES		30	30	35	

DESCRIPTION OF DOCUMENT(S)

DRAWING NO	ISSUE	TITLE
27982-D01		P&ID
" -D02		P&ID
-D03		EQUIP LAYOUT
-D04		STRUCTURAL
-D05		MOTOR POWER PLAN
-D06		ONE LINE ELECT DIA.

DESIGN CRITERIA REVIEW PACKAGE INCLUDING ABOVE DRAWINGS

This design will not work in my opinion. I suggest that a pilot operation be designed to simplify & optimize each phase of the operations. See L. Fong or L. Eng for details of my objections & potential alternatives.
Jim Stone 10-13-82

☐ DISTRIBUTE PMR PER PMR DISTRIBUTION LIST

☐ REQUEST FOR ESTIMATE TO COST ENGRG. ONLY

INPLANT REVIEW: RETURN YOUR COMMENTS TO A. KRIZNAR BLDG. LAKE ARBOR
BY THURSDAY OR BRING YOUR COMMENTS TO THE REVIEW MEETING
IN ROOM Conf Rm BLDG LAKE ARBOR TIME 1:00 PM DATE Fri. Oct. 14, 1982
REVIEWER'S SIGNATURE DATE 10-13-82

CHARGE NO	SUFFIX NO.
830	
E.O. NO.	BLDG. NO.
7864	FAC. 207

PROJ. NO.	SUB. NO	PAGE NO
420906	—	1 OF 1

OJ. TLE SOLAR EVAP. POND SLUDGE REMOVAL

RF-48486 (11/81) DESTROY PREVIOUS ISSUES

0439

276

BEST AVAILABLE COPY

FROM TONY EDEN ☺

Stone
NAME

ANY HIGHLIGHTS SINCE LAST TUESDAY
1. PROBLEMS/SOLUTION

2. ACCOMPLISHMENTS

3. INFORMATION

4. TOP FIVE JOBS STATUS

PLEASE TURN THEM IN BY 3:30 PM
TUESDAY Oct. 1 '85
MONTH DATE

[Handwritten Text]:

1. In my opinion, you are wrong in your assessment of the need for the mini-pleat filter in the new B881 Exhaust Plenum. Your I.L. at Sept. 23, 1985 only expressed the negative aspects. I think that positive aspects should also have been presented. Please note that Rockwell lost the litigation today on low-level radiation contamination. Therefore the contaminated ducts in B881 represent an increased liability. The savings of several million dollars, by the use of the mini-pleat, would provide the funds to clean or replace these ducts.

2. I asked maintenance for a front partition to my reassigned office space. It is extremely difficult to concentrate while being exposed to an active main hallway.

3. This is a request to purchase a book—Static Electrifications. The RFP library will not extend my current loan, but give no reason.

4. I am currently working on Be proj. # 950012—Ingot Break-out Hoods.

5. This is to record my strong protest at the three-day suspension that I received last week. It is a strange system of justice that allows one of two participants in a rule infraction to be judge, jury & executioner. You may recall that you instigated the problem by stopping me in a public hallway with your remarks. You should have called me into your office. I responded in close proximity to you & in a low voice because I get muscle strictures to the point that I cannot even speak, when I am very angry. The "finger" gesture that I gave was in lieu of my shouting a reply to your continued remarks as I reached the end of the hallway. This situation was witnessed by at least four other people.

837

cc – G. Goles

[Handwritten Text]:

1. S&W may perform the decon work.

2. Radiation Monitoring has made a survey of the plenum. See attached survey sheet.

3. Levels of contamination acceptable after decontamination:

	Removable	Total
α	<20 dpm/100 cm^2	NDA
β	< 1000 dpm/100 cm^2	5000 dpm/100 cm^2

4. No painting over contamination. This has been done too much in the past and only acts to create future problems. If necessary, the surfaces of the plenum should be scoured to removed the fixed contamination.

5. The entire area will be considered cold.

6. All work must be done in accordance with the rules and regulations as stated in the HS&E Manual, and as required for the job.

R.A. Miller
O.H.P.
5/6/85

676
666

EMPLOYEE $UGGE$TION PROGRAM

Do not Write in this Block	Date Received	Suggestion No. 80297

	(Last Name) (First Name) (Initial)	BLDG.	Dept Name	Employee Number	Shift
	Stone, James S.	LA02	FE	511396	1
	Job Title	**Tele Ext.**	**Super-visor's Name**	**Tele Ext**	**Date**
	Principal Engineer	2748	A. Eden	2742	10/3/85
	(Last Name) (First Name) (Initial)	**BLDG.**	**Dept Name**	**Employee Number**	**Shift**
	None				

THE TITLE OR SUBJECT OF MY SUGGESTION:

Contractors can profit from "Value Engineering" clause in contract.

SEE REVERSE SIDE BEFORE COMPLETING OR MAILING THIS FORM

PRESENT METHOD OR PROBLEM: A contract was signed last week to build a new $5.6 million exhaust plenum in the roof of B 881. This contract contained the conventional "Value Engineering" clause, which says that the successful Contractor may submit "cost saving" suggestions and he will receive 50% of the savings from acceptable proposals.

PROPOSED METHOD OR SOLUTION: In this case, the Contractor may suggest that the design be changed to utilize the existing plenum in the basement with new high-rate HEPA filters used by European nuclear industry or

simply reduce the present structure size by approximately 58%. In either case the savings would be several million dollars and he would claim half. I am confident that the DOE would consider either proposal and may consider both in order to provide the needed funds to clean up existing contamination in this building and to promote the "Value Engineering" concept to help reduce the National debt. Rockwell and the DOE should establish a "Value Engineering" department.

I have read the Policy and Rules on the reverse side of this form and my foregoing suggestion is submitted for consideration under the stated terms of the Company and Employee Suggestion Program. I understand and agree that if my suggestion is adopted, Rockwell International Corporation and its subsidiaries and the successors and assignees thereof, shall have the right to make full use same.

/s/ James S. Stone 10/3/85 _____

Suggester Date Co-Suggester Date

EMPLOYEE $UGGE$TION PROGRAM

Do not Write in this Block	Date Received	Suggestion No. 80293

	(Last Name) (First Name) (Initial)	BLDG.	Dept Name	Employee Number	Shift
	Stone, James S.	LA02	FE	511396	1
	Job Title	**Tele Ext.**	**Super-visor Name**	**Tele Ext**	**Date**
	Principal Engineer	2748	A. Eden	2742	10/3/85
	(Last Name) (First Name) (Initial)	**BLDG.**	**Dept Name**	**Employee Number**	**Shift**
	None				

THE TITLE OR SUBJECT OF MY SUGGESTION:

Saving energy provides funds to improve environment in B 881.

SEE REVERSE SIDE BEFORE COMPLETING OR MAILING THIS FORM

PRESENT METHOD OR PROBLEM: The current plan is to exhaust the entire building with a 350,000 cfm plenum installed on the roof, because the ductwork is contaminated and there are not sufficient funds in the current budget to clean or replace the ducts. B 881 has only a small laboratory with contaminated air (8000 cfm) to be exhausted in a non-recirculating HEPA filtered exhaust system.

PROPOSED METHOD OR SOLUTION: If the ducts were cleaned or replaced, then 98% of the air could be re-circulated end a small modular exhaust plenum could be utilized by the laboratory. Estimated value of energy

savings is $350,000/year. The estimated value of the reduced liability by eliminating contamination is incalculable.

I have read the Policy and Rules on the reverse side of this form and my foregoing suggestion is submitted for consideration under the stated terms of the Company and Employee Suggestion Program. I understand and agree that if my suggestion is adopted, Rockwell International Corporation and its subsidiaries and the successors and assignees thereof, shall have the right to make full use same.

/s/ James S. Stone 10/3/85 _____

Suggester Date Co-Suggester Date

EMPLOYEE $UGGE$TION PROGRAM

Do not Write in this Block	Date Received	Suggestion No. 80294

	(Last Name) (First Name) (Initial)	BLDG.	Dept Name	Employee Number	Shift
	Stone, James S.	LA02	FE	511396	1
	Job Title	**Tele Ext.**	**Super-visor Name**	**Tele Ext**	**Date**
	Principal Engineer	2748	A. Eden	2742	10/3/85
	(Last Name) (First Name) (Initial)	**BLDG.**	**Dept Name**	**Employee Number**	**Shift**
	None				

THE TITLE OR SUBJECT OF MY SUGGESTION:
Application of new HEPA filters to save approximately $2 million/year in power costs at R.F.P.

SEE REVERSE SIDE BEFORE COMPLETING OR MAILING THIS FORM

PRESENT METHOD OR PROBLEM: R.F.P. utilizes size 5 HEPA filters which are designed for 750 cfm at 1" w.c. (Clean) to 3" w.c. (dirty) pressure drop. There are from two to four stages in various operations with a total design pressure drop of 4" w.c. (2-stage) to 6" w.c. (4-stage). The pressure drop from HEPA filters represents from 65% to 75% of the total pressure drop in the exhaust system and is directly proportional to the fan HP required. The current electric power costs for the R.F.P. is approximately $7 million/year with approximately 60% chargeable to ventilation fan power.

PROPOSED METHOD OR SOLUTION: If the new

HEPA filters utilized by European nuclear industry were used, the power cost would be reduced approximately 58% for exhaust fans. This represents an annual savings of approximately $2 million/year. Since the physical dimensions are the same as the conventional #5 HEPA, there would be no retrofit cost. The new filters may cost a bit more initially, because the nuclear market is down in the U.S., but this incentive would soon create local competition.

I have read the Policy and Rules on the reverse side of this form and my foregoing suggestion is submitted for consideration under the stated terms of the Company and Employee Suggestion Program. I understand and agree that if my suggestion is adopted, Rockwell International Corporation and its subsidiaries and the successors and assignees thereof, shall have the right to make full use same.

/s/ James S. Stone	10/3/85		
Suggester	Date	Co-Suggester	Date

JA-238

EMPLOYEE $UGGE$TION PROGRAM

Do not Write in this Block	Date Received	Suggestion No. 80295

	(Last Name) (First Name) (Initial)	BLDG.	Dept Name	Employee Number	Shift
	Stone, James S.	LA02	FE	511396	1
	Job Title Principal Engineer	**Tele Ext.** 2748	**Super-visor Name** A. Eden	**Tele Ext** 2742	**Date** 10/3/85
	(Last Name) (First Name) (Initial) None	**BLDG.**	**Dept Name**	**Employee Number**	**Shift**

THE TITLE OR SUBJECT OF MY SUGGESTION:
Application of pre-filter has potential to extend life of HEPA filters fifty times.

SEE REVERSE SIDE BEFORE COMPLETING OR MAILING THIS FORM

PRESENT METHOD OR PROBLEM: R.F.P. utilizes large exhaust plenums with de-mister section and HEPA filter stages. These filters are changed when they get dirty as indicated by the increased pressure drop and power consumption. This is a hazardous and expensive operation because air suits must be worn for the filter replacement operation.

PROPOSED METHOD OR SOLUTION: If pre-filter, at approximately 80% efficiency, were retrofitted to the back of the de-mister section, the increased pressure drop would be negligible, the change-out operation would be minimal and the life of the HEPA filters would be extended

approximately fifty times.

I have read the Policy and Rules on the reverse side of this form and my foregoing suggestion is submitted for consideration under the stated terms of the Company and Employee Suggestion Program. I understand and agree that if my suggestion is adopted, Rockwell International Corporation and its subsidiaries and the successors and assignees thereof, shall have the right to make full use same.

/s/ James S. Stone 10/3/85 _____

Suggester Date Co-Suggester Date

JA-240

EMPLOYEE $UGGE$TION PROGRAM

Do not Write in this Block	Date Received	Suggestion No. 80296

	(Last Name) (First Name) (Initial)	BLDG.	Dept Name	Employee Number	Shift
	Stone, James S.	LA02	FE	511396	1
	Job Title Principal Engineer	**Tele Ext.** 2748	**Super-visor Name** A. Eden	**Tele Ext** 2742	**Date** 10/3/85
	(Last Name) (First Name) (Initial) None	**BLDG.**	**Dept Name**	**Employee Number**	**Shift**

THE TITLE OR SUBJECT OF MY SUGGESTION:
Application of new HEPA filters has potential to save over 50% of capital cost to build new exhaust planum for B 881.

SEE REVERSE SIDE BEFORE COMPLETING
OR MAILING THIS FORM

PRESENT METHOD OR PROBLEM: A contract was signed last week to build a new 350,000 cfm exhaust plenum on the roof of B 881. The plenum is sized for 350,000 cfm and would utilize the R.F.P. conventional plenum design, with a de-mister section and two HEPA filter stages. The plenum is about 100' square and three stories high and was bid at $5.6 million.

PROPOSED METHOD OR SOLUTION: If the newer HEPA filter utilized by European nuclear industry were used, the air flow could be increased from 750 cfm/#5 HEPA to 1800 cfm/#5 HEPA. The physical size of the facility would be reduced approximately 60%, for a capital cost savings of

approximately $3 million. The air-flow capacity and fan horsepower would be the same; however, the operating cost would be reduced by the 2/3 reduction in floor area.

I have read the Policy and Rules on the reverse side of this form and my foregoing suggestion is submitted for consideration under the stated terms of the Company and Employee Suggestion Program. I understand and agree that if my suggestion is adopted, Rockwell International Corporation and its subsidiaries and the successors and assignees thereof, shall have the right to make full use same.

/s/ James S. Stone 10/3/85

Suggester Date Co-Suggester Date

Date 5-28-85 ROCKY FLATS PLANT
To Tony Eden
From Jim Stone MEMORANDA
"Say it in Writing"

MESSAGE:
If an ounce of prevention is worth a pound of cure, I have discovered a method of preventing over-pressure excursions from gloveboxes, as an alternative to the use of dump valves. Over-pressurization is caused by a malfunction in the supply mechanism for auxiliary gases. This malfunction may be a ruptured supply hose for compressed air or a frozen oxygen valve which may cause an explosion. The key is to limit any supply of an auxiliary gas. This can be accomplished by manually filling a small tank, that is properly sized to prevent over-pressurization or an explosive mixture even if the tank or supply mechanism failed. This is similar to the "day" tank oil supply for a diesel-electric generator operation. I will calculate the required parameters in the near future.

/s/ James S. Stone
Signature

JA-243

Internal Letter — Rockwell International

Date: June 28, 1985 — No

TO	Name, Organization, Internet Address	FROM	Name, Organization, Internet Address, Phones
	- J.R. Handschy - Industrial Safety - T452D		- A. Eden - Facilities Engineering - LA002 - 2742

SUBJECT - MODULATING/DUMP VALVES PROBLEM

On June 25, 1985, Bill McAndrew and Ken Sedlmayr tested in accordance with SMU-301 modulating and dump valves at Anderson Greenwood Co. facilities in Houston, Texas. During the course of these tests, they found the valves to maintain set pressures only at very low flow rates (less than 20% valve capacity), and at very high flow rates (near valve capacity). At the mid-range of valve capacity, which is normal operating range, the valves operated unacceptably. Therefore, glovebox pressure could swing from -4" to positive pressures. Consequently, the valves have failed the tests and should not be used to control glovebox pressures until a new valve is developed.

Purchasing is using SMU-301 to attempt to solicit new manufacturers, but past efforts to do this have not been successful. In the interim, I recommend we revert to the manual valving system.

/s/ Anthony Eden
A. Eden, Manager
Plant Utilities Engineering

cc:

S. E. Cerise
M. W. Corcoran
E. F. Ernst
L. Q. Fong
D. L. Gally
G. L. Hansen
J. L. Hebert
R. K. Jenkins
A. F. MacDonald
D. L. Marsh
L. A. Remley
C. R. Rose
L. M. Stoddard
V. Terkun

JA-245

Internal Letter — Rockwell International

Date: January 15, 1986 — No.

To (Name, Organization, Internal Address)	FROM (Name, Organization, Internal Address, Phones)
- E. O'Neil - Facilities Project Management - Building 130	- J. S. Stone - Facilities Engineering - LA002 - 2748

SUBJECT - PROJECT NO. 450918 - BE SHOP VENTILATION
COMMENTS RE MEETINGS OF 12/20/85, & 1/6/86, AND
REPLIES TO COMMENTS FROM REVIEW OF EDC ISSUED 12/10/85

The following review of FE-HVAC Policies may resolve some of the concerns expressed in the above reviews and establish the design parameters for the Be Exposure Control Projects.

1. All Class A (Pu) and Class B (Ur/Be) facilities will have the ventilation supply system designed for air flow control and the exhaust system designed for differential air pressure control.

2. All Class A and B facilities will have HVAC controls designed to be integrated with a future centralized Data Requisition and Control System.

3. All Class A and B facilities should have the air supply ionized to neutralize the static electricity

of airborne particles. This reduces the tendency of airborne particles to "plate-out" on room and duct surfaces and keeps them in suspension until they can be captured in the HEPA filter plenum.

4. All Class A and B facilities should have the ventilation air system designed for operating at seven air changes per hour (a.c./hr.) normally to conserve energy. The system should also have the capacity to operate at 15 a.c./hr. during an emergency to limit the spread of contamination and with item No. 3, to quickly remove and contain the contaminate.

5. All Class A and B facilities should control contamination first by "preventive measures" and secondly, by control as close to the source as possible. The main building filtration systems should be considered as backup insurance against any release of contaminants into the outside environment. The "close to the source" containment prevents spread and accumulation of contaminants within the building. This will necessitate the design of serviceable "dropout" boxes with pre-filters.

6. All glove boxes, machine hoods, lab hoods, etc. should have the ventilation system designed to control the optimum aerodynamic air flow within the enclosure and be provided with indicators to confirm the proper operation to the operator. This will necessitate the design of specific orifice plates for each different machine hood.

J. S. Stone
Plant Utilities Engineering

What's the purpose of the 3-month report?

According to Ron Smith, director, Management Systems & Audit, "We use the 3-month report as a corrective tool so that we tan take appropriate corrective action before the official 6-month CPAF evaluation."

Does Rockwell have any say in the 3-month grading?

Rockwell reviews the draft preliminary report with DOE/RFAO before it is finalized. "We have the opportunity to discuss grades we don't think reflect the actual performance of the plant," Smith said. For example, we may believe that a 'significant achievement' which DOE left out should be added. We also have not only the opportunity, but also an obligation, to clarify any situation which could be assessed as deficient, for two reasons: if the assessment is not accurate, to present the facts for proper recognition, or if the assessment is correct, to learn from it and fix it."

How does the 3-month report affect our official 6-month evaluation?

There is some influence, but DOE does not use the 3-month report as an absolute baseline. We like to think we have the opportunity to work off any deficiencies RFAO perceives in the preliminary 3-month report before the official 6-month CPAF evaluation is performed," Smith said. "Some deficiencies may carry over, but we trust we've corrected all the ones that we can."

How does CPAF affect our operating budget?

CPAF grades do not affect the amount of funding we receive from DOE to operate the plant. However, within our operating budget, DOE gives us the opportunity to earn an award tee. The award fee is based on superior performance in the group of key Functional Performance

Areas (FPAs) that DOE identifies for each 6-month CPAF evaluation period. A higher CPAF grade average can increase the award fee for Rockwell.

Is an award fee automatically given?

No. DOE will not even consider an award fee if we do not perform at least at a satisfactory level in all 37 FPAs (see attached list). If we do perform at least satisfactory overall, then the CPAF award fee is based on an evaluation of the key FPAs.

How is the CPAF award fee allocated?

Award fee dollars go to Rockwell Corporate just like operating profits from other company divisions. Award fee dollars are not allocated in any manner back to the Rocky Flats Plant, except as indirect benefits from Rockwell Corporate. Naturally, superior performance on our part also enhances our working relationship with our customer, DOE.

JA-249

FUNCTIONAL PERFORMANCE AREAS
ROCKY FLATS PLANT
8/26/85

GENERAL MANAGEMENT*

TECHNICAL/PROGRAM OPERATIONS

Delivery Performance*
Production Support*
Chemical Operations*
Technical Support
Quality Control*
Development Work
Nuclear Materials Management
Waste Management*
Nonweapons programs

OPERATIONAL SUPPORT

Transportation Safeguards
Security*
Nuclear Safeguards*
Facilities Engineering & Construction Management
Facilities Maintenance, Utilities and Energy Conservation Management*
Industrial Safety
Fire Protection
Health Protection
Environmental Protection
Emergency Preparedness
Nuclear Criticality
Facilities Safety

ADMINISTRATIVE SUPPORT

Operating and Capital Resources Management
Financial Management
Legal
Internal Auditing
Automatic Data Processing*
Telecommunications & Data Communications
Records Management
Property Management
Procurement Management
Industrial Relations
Equal Employment Opportunity
Administrative Services
Public Affairs
Classification
Technical Information

* One of the group of FPAs on which CPAF award fees will be based for the 6-month period ending September 30, 1985

FD-302 (REV. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

Date of Transaction 7/28/87

— 1 —

JAMES S. STONE of 6735 West 84th Circle, #69, Arvada, Colorado 80003, phone 420-3332, was contacted. STONE is employed as a Consulting Professional Engineer. STONE met with SA WILLIAM F. SMITH of the ENVIRONMENTAL PROTECTION AGENCY (EPA)/ NATIONAL ENFORCEMENT INVESTIGATIONS CENTER (NEIC) and this Agent. STONE advised that he has some information about the ROCKY FLATS FACILITY, and provided the following:

STONE provided copies of the following to the FBI, which are attached as a portion of this report:

1. Resume of Background
2. Civil Action Number 86CV3817

STONE has worked at the ROCKY FLATS facility as a Consultant and ROCKWELL INTERNATIONAL CORPORATION (RIC) employee for several years, until he was terminated in March, 1986. While with RIC, he was the lead principal engineer, and had unlimited access at ROCKY FLATS. He said that he was terminated from RIC for discussing some discrepancies with a resident DEPARTMENT OF ENERGY (DOE) employee.

After leaving RIC, he researched the fact that DOE can only limit a corporate operator contract to two, five year contracts. RIC has been at ROCKY FLATS for twelve years now.

Contrary to public knowledge, ROCKY FLATS MISSION (Main) is to accept wastes (hazardous and nuclear) from other DOE facilities. STONE is aware that some private facilities, possibly educational type, send their wastes to ROCKY FLATS. The wastes are brought in by truck and railcar, almost on a daily basis.

STONE advised that DOE employs several agency representatives at ROCKY FLATS, possibly four or five. He said that there was no way that DOE maintains one representative for every 30 RIC employees. RIC employees are forbidden from discussing any controversies in front of a DOE employee. Usually, the DOE representatives mind their own business and remain

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Investigation on 6/25/87 at Denver, Colorado File # DN 249-43-64

by SA Jon S. Lipsky/mvk Date dictated 6/28/87

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secluded from the RIC employees.

STONE advised that the description of the incinerators at ROCKY FLATS are generally correct as cited in the Comprehensive Environmental Assessment and Response Program (CEARP) of April, 1986. STONE noted that RIC incinerates more than old gloves, paper and wood.

RIC has been using an incinerator in buildings 771 and 371, that burn volitized material. In 1980, two "fluid bed" incinerators were designed and placed in Building 776.

The fluid bed incinerators are the devices to be used for the proposed test burns of hazardous and nuclear wastes. The incinerator is designed to mix chemicals on a bed of sand, with heat as a catalyst, create a chemical reaction to render hazardous chemicals to salt, water and carbon dioxide. The process of heating is not designed to reduce the volume of the waste. STONE said that he helped to design the fluid bed incinerators.

In 1981, the fluid bed incinerators were laboratory tested, and failed. The pilot incinerator has remained on line, and used to incinerate wastes on a daily basis, since 1981. STONE personally knows that plutonium wastes have been incinerated, capsulized in glass, and sent out for burial. DOE possibly has used some old salt mines in Idaho, for the burial of the nuclear waste.

STONE noted that RIC does not segregate the domestic waste from hazardous/nuclear wastes, and has continually burned all the wastes on a daily basis. DAVE GUFFY, who works the incinerator in building 771, who is possibly willing to confirm this. Also, the Chief of Construction, RON (Last Name Unknown) (LNU), may also have further information.

RIC currently distills and fractionates various oils and solvents, but the wastes are geared for incineration. Building 771 was dedicated to burning gloves. Building 374, where the fractionating is done, is routed by above-ground pipes to tanks on the northside of Building 774.

STONE said that he believes that the ground water is contaminated from previous years of waste burial, and

land application. He designed a tertiary sewer treatment system at

the facility; however, the hazardous wastes are not treated with the same care. The hazardous waste lagoons tend to overflow during and after a good rain, and the wastes are discharged without being treated.

STONE advised that RIC has numerous PCB contaminated transformers. Before 1980, it was common practice to spray the facility roads with PCBs.

In the machine shops, STONE discovered that Berilium particulates have become air-borne, and is a potential hazard to RIC employees.

STONE advised that various portions of ROCKY FLATS are considered "hot." Due to the recent burial of hazardous/nuclear wastes, RIC will not allow any construction in and around the "hot" areas. He said that RIC will sometimes pour asphalt over the "hot areas," made to appear like a parking lot, but no one uses. South of Building 774 (tank room), STONE had intended to construct a new building, but was told that the area was "hot."

STONE said that Plutonium is used in Buildings 776 and 707, and research is conducted in Building 559 RIC, as part of the DOE contract, receives a monetary bonus for continuous safety hours. STONE advised that HENRY URANO, a RIC employee, once fell from a building and refused to report a severe injury. STONE believes that the employee are under pressure to not report injuries because RIC would lose the DOE bonus.

STONE advised that he has maintained copies of various internal RIC documents and is willing to share them with the FBI.

FEDERAL BUREAU OF INVESTIGATION

Date of Transaction 2/17/88

JAMES S. STONE of 6735 West 84th Circle, number 69, Arvada, Colorado, 80003, telephone 420-3332 was contacted at 1200 Byron G. Rogers Federal Building. STONE agreed to an interview and was present with his attorney, HARTLEY DAVID ALLEN. Also present during the interview was Assistant United States Attorney (AUSA) KENNETH R. FIMBERG and Special Agent WILLIAM F. SMITH, of the ENVIRONMENTAL PROTECTION AGENCY (EPA)/NATIONAL ENFORCEMENT INVESTIGATIONS CENTER (NEIC). After a brief introduction and stated purpose of the interview, STONE provided the following information:

The interview began at approximately 10:15 AM, a lunch break was exercised between 12:30 PM through 1:50 PM. and concluded at about 3:25 PM. STONE provided a copy of the April 6, 1987 letter from S. R. FOLEY to Senator WILLIAM L. ARMSTRONG to the FEDERAL BUREAU OF INVESTIGATION (FBI), and the letter has been incorporated as a portion of this report.

STONE was employed by the ROCKWELL INTERNATIONAL CORPORATION (RIC) as the Chief Mechanical Engineer for the ROCKY FLATS NUCLEAR PLANT (RFNP) until about March, 1986. He had overall access to the RFNP along with the Structural and Electrical Engineers for RIC. His duties included the resolution of engineering problems. During his tenure at the RFNP, STONE was supervised by TONY EDEN, Manager of Utility Design; SAM CERISE, Manager of Design, and GARY COLES; BILL NICKEL, Manager of Engineering;

DOUG CROSSLAND, Director of Facility Services; and J. DORE, General Manager. STONE supervised twelve to fifteen employees, with principal engineer and draftsmen duties.

The General Manager supervised four Division Directors, categorized as Production, Security, Operations and Services. STONE believes he was ultimately supervised under the Services Director, as was the RFNP environmental officer. The Health Safety Environmental (HSE) Manager is

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Investigation on 2/17/88 at Denver, Colorado File # DN 249-43

by SA JON S. LIPSKY/pjr Date dictated 2/18/88

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and was GARY POTTER. POTTER also holds a position with the JEFFERSON COUNTY HEALTH DEPARTMENT.

STONE recalled working with A Blue Ribbon Committee, KEN SHRUNK and DENNIS MURPHY on a particulate problem in building 444. As a result of a death,

STONE was asked to engineer a solution to the Berylium machining operation. STONE said Beryluim is extremely toxic and investigated the machining operation to control the dust problem. STONE determined through his investigation of December, 1984 through March, 1985 that the machinists were forming Berylium without a cutting oil. The larger metal pieces were being swept up, but the particulates were collecting on the walls and in the ceiling.

RIC employed an electronic monitoring system to detect the presence of Berylium dust, but the monitors did not indicate the presence of the metal dust. STONE perceived a problem, as the dust was accumulating on the walls and in the ceiling like snow drifts. DENNIS MURPHY exposed several photos of the dust in the ceiling. STONE said he believes that the monitors failed to indicate the presence of the dust because of inherent problems with the monitors. The monitors used a plastic disk to receive the dust, but the air flow from the suction may have caused an electro-static field. As a result, the dust would be repelled from the monitor and sought a more conducive resting place.

STONE said be recommended to his supervisor, that the Berylium machine shop should cut the metal in submerged oil, which would control the particulate problem. One of the machinists has been diagnosed as having Alzheimer's disease, but STONE said the employee is not suffering any memory loss and probably has Beryliosis. STONE was admonished by his supervisor to not discuss his finding with any Department of Energy (DOE) officials.

STONE identified the locations for each RIC incinerator; building 771, where the old incinerator has been since 1970's, building 779, where the pilot and full scale fluid bed incinerators have been since about 1981, and building 371, where a new incinerator is located.

DAVE GUFFY, a retired RIC employee, who was the chief operator for 771, may have further information about the incinerator operating times and the type of material that was burned. STONE said he was under the impression that the 771 incinerator was used to salvage various materials; reduce the volume of waste; and incinerate trash.

Building 779 is a research lab where RIC has constructed two fluid bed incinerators to treat mixed nuclear and hazardous wastes. The pilot incinerator has an approximate feed rate of 50 pounds per hour and the full scale model is three times larger. STONE believes that the 779 incinerator was continuously operated from 1981 until about 1986, up until the time he was employed at the RFNP.

STONE reviewed his statement of June 25, 1987 and noted two corrections: on page 2, paragraph 1, last line 776 should be 779; and on page two, paragraph 2, line 7, STONE said he did not help to design the fluid bed incinerator, but should have been asked to review the design.

STONE said he was aware that the fluid bed incinerators were tested in 1981, but he was unable to find the 99.9999 test results; the results of the test indicated less than 99.9999 efficiency and resulted in failure.

STONE said each building has a posted Quality Assurance manual for details about the operations. The records are also maintained at the plant library, Engineering Department library. Building 991 is where the nuclear waste is stored prior to incineration.

STONE reviewed three RIC photographs of an incinerator, copies of which have been attached as a portion

of this report, and believes they depict the 779 incinerator. STONE recapped the building numbers or locations of pertinent RFNP buildings:

779	Fluid bed incinerators
771	Incinerator
371	New incinerator
991	Nuclear storage
708	Plant library
124	Manager's offices (Administrative Building)
130	HSE
881	Contaminated ducts
444	Machine shops for Berylium
447	Restructured Berylium machining

Continuation of FD-302 of JAMES S. STONE. On 2/17/88.
Page 4

Building closest to the west side gate, Engineering Department library.

STONE said that the older plutonuim trigger housings are re-fashioned in building 447, and the process produces a slag.

STONE stated, in about 1981, be learned to not discuss RIC problems with DOE personnel. After hearing about some recommendations on the RFNP cooling towers, for replacement, BILL NICKEL told him not to discuss the situation/problems with DOE. STONE said he developed a friendship with RON FOSTER, DOE Chief of Construction, who may be cooperative.

STONE recalled that the RFNP accepted wastes for treatment, from private entities. Payment for receiving the wastes would be detailed under the RIC, Cash Accounts. STONE also said RFNP has numerous waste sites, from previous burial practices.

DN 249-43
JSL/tmp

The following investigation was conducted by Special Agent JON S. LIPSKY at Denver, Colorado, on February 29, 1988.

JAMES S. STONE of 6735 West 84th Circle, #69, Arvada, Colorado 80003, telephone 420-3332, sent the attached letter of February 26, 1988, to the FEDERAL BUREAU OF INVESTIGATION.

JAMES S. STONE

Consulting Engineer

6735 W. 84th Circle #69
Arvada, CO 80003
(303) 420-3332

February 26, 1988

Jon Lipsky, F.B.I.
P.O. Box 1229
Denver, CO 80201

Re: Projects on incineration of radioactive wastes at Flats:

Daily record of time:

Auth. No.	Date	Project Title
300607	FY80	Pyrochem. Inline instrumentation, B779
310378	3/81	Hydraulic Process control, B779A
900406	8-10/81	Pyrochem. Development Facility (Ken Mohr)
900421	10-12/81	High Temperature filter specifications
900415 349190	11-12/81	Nu-wastes immobilization plant
398023	3-83	Vacuum heat treat furnace
318107	10-11/84	Contaminated furnance, Rev. B

Auth. No. Code:

XXX Sequential nos. 000-999

X Type of funding: 0 for capital equipment & expense,
5 for GPP (general plant project)

X Fiscal year issued (last digit of year)

X Type of project: 3 for capital funded
4 for expense funded
5 for maintenance work order
9 for design criteria only

Construction Management Review, 2-21-86:

FY 87 Line Item Projects:

379685 (389685); Pu Rec. Mod. Projects; Kriznar, Proj. Adm. (PA); Jenkins, Proj. Engr. (PE); $2.15 Mil. Total Est. Cost (TEC)

FY 90 Line Item Projects:

309020; Pyrochem Dev. Fac.; Bange, P.A.; Walsh, PE; Sch. 44 LR 12/12/84 by J.J.; not supported by DOE

FY 91 Line Item Projects:

319101; Pu Recovery Support Fac.; Wiggins, P.A., Wiggins, PE; Sch. 44 LR 12/12/84; design status – hold; $3.0 Mil. TEC

FY 87 General Plant Projects:

375620; Install Plenum in Pu Rec. Fac., 771; $0.3 Mil. TEC; Des. By LATA

FY 84 Capital Equip. Projects:

340328; Real Time Analysis of Pyrochemical Process; 779A; User - RD; Current status (9-30-85) FPCO 3-18-85

FY 85 Capital Equip. Projects:

350567; Calcining & Burning GB; 779A.; User - RD; Current status (9-30-85) Part IV

FY 85, Expense Projects - Pu Operations:

440812; Precip./Calcin. Process; 371, Status 9-30-85 – Installation

440848; Incinerator Stripout; Status, 9-30-85, Construction

FY 85 Expense Projects - Research &Development:

410103; Install Glove Box for Pyrochemistry, 779; Status, 9-30085, Hold.

450103; Heat Detection, Glove Box 985, B779; Status, 9-30-85, As-builts.

FY 85 Line Items:

358204; Incinerator Plenum; $1.1 Mil. TEC; Sch.: TI 6/86, TII 12/86, Constr. Str. 4/87, Constr. cpl. 12/87; 0% Cpl. 2/86

FY 82 Line Items:

338615; Precipitation/Calcination, 771; $6.29 Mil. TEC; 44% cpl. 2/86

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 3/4/88

JAMES S. STONE of 6735 West 84th Circle, Number 69, Arvada, Colorado, telephone (303) 420-3332, telephonically contacted this Agent and advised the following

STONE said TERRY FOPPE, ROCKWELL INTERNATIONAL CORPORATION (RIC), telephone 966-7436, is the person who administers the Quality Assurance Manuals. He also corrected his previous statements that the fluid fed incinerators were in building 779; in fact, they are in building 776.

Investigation on 3/1/88 at Denver, Colorado

File # DN 249-43-128

by SA JON S. LIPSKY/mms Date dictated 3/1/88

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DN 249-43
JSL/pjr

The following investigation was conducted by Special Agent (SA) JON S. LIPSKY at Denver, Colorado, on March 9, 1988.

JAMES S. STONE of 6735 West 84th Circle, Number 69, Arvada, Colorado, telephone number 420-3332, mailed the attached copy of the June, 1985, telephone directory for ROCKY FLATS PLANT (RFNP).

STONE also advised that RANDY MAC DONALD of DOMINION SERVICES, INCORPORATED, Denver, Colorado, a RFNP utilities employee may have further information about Buildings 771 and 776.

DN 249-43
JSL/llt

The following investigation was conducted by Special Agent (SA) JON S. LIPSKY at Denver, Colorado, on March 9, 1988.

JAMES S. STONE OF 6735 West 84th Circle, Number 69, Arvada, Colorado, telephone number 420-3332, mailed the attached copy of the June, 1985, telephone directory for ROCKY FLATS PLANT. STONE also noted the following:

"The fluid bed incinerators are located in Building 776 instead of Building 779 as I said earlier. If you requested the process operation route sheets (PORS) on these incinerators from 1980 to date, you may have the data that you need. PORS's outline the parameters of specific operations to designate the tooling required and to identify the specifications and reference documents that apply to these operations. They would also include the manifests of material to be incinerated and safety precautions required. Also enclosed is a better map for your file. Please return directory only Jim"

A copy of the map was made; the directory and map was returned.

DN 249-43
JSL/kt

The following investigation was conducted by SA JON S. LIPSKY at Denver, Colorado, on March 25, 1988.

JAMES STONE, telephone 420-3332, voluntarily provided over 1100 copies of documents he has retained while employed by ROCKWELL INTERNATIONAL at the ROCKY FLATS plant to the FBI. The documents consisted of Utilities Department transactions and personal litigation papers. The documents were copied on the March 26, 1988 weekend, and returned to STONE on March 28, 1988.

DN 249-43
JSL/lra

The following investigation was conducted by SA JON S. LIPSRY on January 11, 1989 at Denver, Colorado:

JAMES S. STONE of 6735 West 84th Circle, Number 69, Arvada, Colorado, 80003, mailed the attached three page memo. The memo, dated January 28, 1988 regarding the ROCKY FLATS Albuquerque Operation Maintenance/Construction meeting of January 14, 1988, was made available to STONE through a pre-civil trial discovery request.

THE DISTRICT COURT

COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 86643817 R-5

JAMES S. STONE,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	
	)	
ROCKWELL INTERNATIONAL CORPORATION,	)	COMPLAINT FOR LIBEL AND BREACH OF CONTRACT
	)	
GARY W. COLES	)	
	)	
ANTHONY EDEN,	)	
	)	
DOE I,	)	
	)	
DOE II,	)	
	)	
DOE III,	)	
	)	
DEFENDANTS	)	

COMES NOW the plaintiff, above named, for a complaint against the defendants and states, alleges and avers as follows:

FIRST CLAIM FOR RELIEF

1. The true names or capacities, whether individual, corporate, associate, or otherwise, and defendantship of defendants DOES I through III, inclusive, are unknown at the time of the filing of this complaint to plaintiff, who therefore sues said defendants by such fictitious names and will ask leave of court to amend this complaint to show their true names or capacities and defendantship when the same have been ascertained.

* * *

21. Defendant denied the plaintiff equal application of the law by imposing singular restrictions on the plaintiff that were not generally imposed on others.

22. Plaintiff is entitled to judicial relief from the actions of the defendant for libel, sleepless nights and mental anguish because said actions were deflamatory and unjust.

WHEREFORE, plaintiff prays for judgement against defendant, and each of them, as follows:

1. Defamation of character and mental anguish in the sum of Five Million Dollars.

2. For sums incurred and to be incurred for medical treatment in conformity to proof.

3. Loss of income incurred and to be incurred inconformity to proof.

4. Cost of suits.

5. For such other and further relief as to the court seems just and proper in the premises.

SECOND CLAIM FOR RELIEF

1. Plaintiff incorporates herein all of the allegations of the First Claim for Relief as if fully set forth herein.

2. On November 10, 1980, plaintiff signed the Employment Certification, Invention and Secrecy Agreement for defendant.

3. Plaintiff was told by defendant that a billion dollar modernization and expansion program was underway at the Rocky Flats Plant (RPP), and that an engineering

department would be developed to do most of the work in-house. The plaintiff had a right to rely on the personal and professional integrity of his former manager and defendant and did rely on them.

4. Plaintiff soon learned that good engineering was incidental to spending the budget and maintaining the schedule, but most important was the shift of design responsibility from defendant to Architect/Engineer (A/E) sub-contractors, even though RI maintained a staff of several hundred engineers. This was contrary to our agreement.

5. Plaintiff also soon learned that the defendant's policy was never to allow the U.S. Department of Energy (DOE) engineers to learn of a mistake by the defendant, so as not to jeopardize the performance rating for the cost plus incentive allowance fee. This repeatedly compromised the ethics of the plaintiff and involved him in a fraudulent practice, including but not limited to the following:

a) On November 12, 1980, plaintiff recorded an objection to removing a forty-ton air conditioning unit for use on a four-ton load in another building. It soon became obvious that the existing engineers were not competent in mechanical engineering. The defendant's project engineers were in charge, since the design department was not fully developed, and the plaintiff's engineering report was ignored.

b) On December 1, 1980, plaintiff recorded an objection to pumping nitrate enriched wastewater from the east side of the RFP to the west side, for disposal by irrigation, in lieu of simply siphoning the wastewater to lower terraces on the east side. Plaintiff's concern was to reduce the migration of groundwater through contaminated soil on plant-site toward domestic water reservoirs, and to reduce cost. Defendant ignored the plaintiff's engineering report.

c) On December 15, 1980, plaintiff recorded serious deficiencies in design criteria of the Title I submittal

for a multi-million dollar Cooling Tower Modification Project, which was ignored by the defendant. On July 16, 1981, plaintiff recorded another report, challenging the validity of the design criteria on the above project, which was also ignored by the defendant. On August 27, 1981, plaintiff made a presentation to the defendant, which was attended by a DOE engineer, wherein the design deficiencies were exposed and a proposal to reduce equipment costs by 90% was presented. Upon defendant's refusal to consider, the plaintiff asked the DOE representative to investigate. In September, 1981, plaintiff was severely admonished by defendant and directed never to address a DOE representative again. Defendant also ordered a letter of reprimand be given to plaintiff. The cooling towers were installed as originally specified at great cost; however, the alleged deficiency in cooling water capacity still exists, because the deficiency was in the distribution system which was not corrected and not in the source of supply.

d) On March 20, 1981, plaintiff recorded an objection to the design of the air-conditioning system in the Wind Site building. It was alleged to have "the countries most efficient space heating systems", and relied 100% on solar energy. The defendant ignored the plaintiff's report. The system was a dismal failure and required much money to correct. The heating system was corrected by installing a huge electrical resistance heater, that was justified as a need to test the power output of wind generators, but its real purpose was to heat the building at great operating costs. The A/E firm was still retained by the defendant for other projects.

e) On March 3, 1982, plaintiff recorded an objection to paying an A/E firm a 45% fee and then paying an additional charge to correct their own mistakes.

6. Plaintiff has presented many constructive engineering reports to the defendant, which have all been ignored, including but not limited to the following:

a) On April 7, 1983, elimination of refrigeration for drying compressed air.

b) On May 5, 1983, develop method of estimating project design man-hours for preliminary project scheduling and resource planning; method of development and evaluation of conceptual designs for alternatives; method for review of technical contract documents for A/E firms.

c) On May 13, 1983, development of an assignment-scheduling chart for improved project management.

8. On Juen 19, 1983, plaintiff recorded an objection to farming out $230,000 worth of pre-Title I engineering work with 38% for indoctrination and education of the A/E firm employees to be furnished by RFP employees. The engineering fees were getting enormous and the U.S. Department of Energy (DOE) was not getting much for the taxpayers' money. The defendant ignored the plaintiff's concern.

9. On March 20, 1984, plaintiff reported to defendant on the chaos, waste and apathy that existed in facility engineering, including but not limited to the following:

a) The "design project list" for scheduling was grossly inadequate. About 50% of the items that should be controlled were not listed. Those that were listed had incorrect data. Defendant had been working for years supposedly to develop this system; however, the format changed weekly and it was worthless.

b) Facility Engineering was not complying with the DOE design manual for "state of the art" technology and hundreds of millions of dollars were being wasted.

c) A laboratory building air-conditioning system was installed without heat or make-up and the change cost extra.

d) Air conditioning systems were being scheduled for completion in winter, while main-frame computers were being shut down due to overheat in the

summer.

10. On April 27, 1984, plaiantiff's original manager was replaced with a defendant. The new manager was a young, inexperienced civil engineer, who was to supervise the utility design department for mechanical engineering. Plaintiff asked the manager of facility engineering about the apparent enigma and he replied "I didn't have any experience either when I first started". This was a personal and unwarranted insult to the plaintiff and a violation of professional ethics by the defendant.

11. Plaintiff reported on many plant safety situations which were ignored by the defendant, including but not limited to the following:

a) On January 2, 1985, plaintiff reported on the lack of approval of the "asbestos removal" standards which the plaintiff had developed, but which had been waiting months for approval while serious hazards existed at RFP in the remodeling work.

b) On January 8, 1985, plaintiff reported on an explanation of why Beryllium dust had not been captured and monitored by the Health Safety Department (HS). HS had been monitoring for many years with no positive tests indicated; however there was Berylliosis reported and a major campaign had to be started to correct the situation.

c) On April 16, 1988; plaintiff reported on the existence of contaminated ductwork in a building that had recently been designated as "clean" and suitable for offices. The reason given for not cleaning the ducts was that it was too expensive. Plaintiff then proposed a plan to finance the clean-up by utilizing new technology filters on the same project that would save about $5 million in capital cost on this project and about $2 million/year in energy cost throughout the RFP if generally adopted. This plan was presented prior to Title I review, but disregarded by defendant.

12. On February 13, 1985, defendant issued Promotion Guidelines for "Posted Job Vacancies" which indicated that

the plaintiff must have received an "excellent" rating for thirty consecutive months to be eligible for promotion or to sign a posting for transfer to another department. Plaintiff had signed over thirty "posting" notices trying to get out of facility engineering, without success. Plaintiff had achieved an "excellent" rating for two consecutive years prior to the 1985 annual review and the sudden reduced rating to "satisfactory" for dubious and unjust reasons. This secret policy had been in effect for several years prior to this disclosure. The failure to disclose the terms for promotion of the plaintiff by the defendants is a breach of contract and fraudulent.

13. Plaintiff does not possess sufficient information to allege ultimate facts, as the only source of information is in the sole custody and control of the defendant for presumably security reasons, but plaintiff believes that many unique design concepts for improving product quality and production have been removed from consideration and potential implementation at RFP by the defendant, including but not limited to the following:

a) An alternate inert gas to reduce part deterioration.

b) Wet machining of beryllium parts.

c) Unique energy conservation concepts.

14. Defendant has subverted and breached the contract with the plaintiff for honest, competent, professional engineering work.

15. Defendant has caused the plaintiff sleepless nights and mental anguish for being exposed to unethical and fraudulent practices by the defendant.

16. Plaintiff is entitled to judicial relief from the actions of the defendants for breach of contract, defamation of character and substantial damage to the plaintiff's reputation as a consulting engineer.

WHEREFORE, plaintiff prays for judgement against defendant, and each of them, as follows:

1. Defamation of character and mental anguish in the sum of Five Million Dollars.

2. For sums incurred and to be incurred for medical treatment in conformity to proof.

3. Loss of income incurred and to be incurred in conformity to proof.

4. Cost of suits.

5. For such other and further relief as to the court seems just and proper in the premises.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-C-1154

UNITED STATES OF AMERICA,
ex rel., and JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION, a corporation,

Defendant.

PLAINTIFF'S CONFIDENTIAL DISCLOSURE STATEMENT OF MATERIAL EVIDENCE AND INFORMATION

---

* * *

Plaintiff James S. Stone herein submits to the United States Government, pursuant 31 U.S.C. §3730(2), his written disclosure of material evidence and information. Served concurrently herewith is a copy of Mr. Stone's Complaint Under False Claims Act, which document is being filed in camera and under seal with the United States District Court for the District of Colorado. This disclosure statement is confidential.

I. INTRODUCTION

Mr. Stone is a Professional Engineer, registered in a number of states. His experience and qualifications span more than 40 years. Mr. Stone is an established expert in the area of waste disposal. He currently holds patents in the United States and 14 foreign countries for sewage

treatment equipment and processing. Attached hereto as Exhibit "A" is a copy of Mr. Stone's resume, with attached statements of qualifications, engineering achievements and commendations.

His work on military and defense-related projects is especially impressive. During World War II, he worked on the B-19 Bomber and the Pan-Tex Ordinance Plant at Amarillo, Texas. During the 1950's his military and defense related work included design of a boiler plant for the Rocky Flats Nuclear Weapons Plant, then operated by the Atomic Energy Commission, and the design and construction of U.S. air Force Bases at Thule, Greenland, and Lowry Field, Colorado, and rocket fuel related design for Martin Marietta Corporation.

In 1961 he performed crucial engineering analysis and testing of the missile pad ground support systems for the Atlas Missile Programs. He also performed engineering services for the Titan I ans II Missile Projects and for air conditioning systems installed at the Denver Federal Center and Critical Mass Laboratory for NASA, Huntsville, Alabama, and for the Department of Energy ("DOE") at Rocky Flats, Colorado.

From November 1980 until March 1986, Mr. Stone was employed by Rockwell International Corporation in connection with its operation of the Rocky Flats Plant, Golden, Colorado. He was employed as the Lead Principle Engineer in the Utility Design Department, Facility Engineering Division. The knowledge and information obtained by Mr. Stone during this employment, and at times thereafter, has resulted in Mr. Stone being an original source of information and allegations which have given rise to a number of investigations concerning the Rocky Flats Plant by involving the Federal Bureau of Investigation ("FBI"), the Environmental Protection Agency ("EPA"), the Nuclear Regulatory Commission ("NRC"), members of Congress, and a U.S. Grand Jury. Mr. Stone's information is also an original source of issues and disclosures recently

published by the news media.

The gist of Mr. Stone's False Claims Act lawsuit, brought for the United States Government and himself, is that all of the payments received by Rockwell International Corporation in connection with its operation of the Rocky Flats Plant from at least as early as November 1980 and continuing up through the present time are based on false "claims" within the meaning of that term as used in the False Claims Act, 31 U.S.C. §3729, et seq., as amended.

The knowledge and information obtained by Mr. Stone has demonstrated, and will demonstrate, that during the times in question, and continuing, Rockwell International has knowingly committed a multitude of crimes and other violations which include environmental crimes, the needless exposure of the Rocky Flats work force to toxic substances, the creation of conditions leading to substantial hazards of "criticality incidents" that could involve releases of radiation into the environment of the Denver metropolitan area, the sue of wasteful engineering practices and purchasing policies, the suppression of reporting of accidents and injuries, the refusal to implement proved measures for removal of groundwater and airborne contamination, the improper treatment of hazardous wastes including the illegal mixing and incineration of mixed wastes, the lack of maintenance on safety devices and contamination alarm systems, and other acts including the withholding of inventions or technology from the governments.

Overlaying this web of Rockwell's wasteful and hazardous practices is Rockwell's elaborately constructed schemes of concealment and cover-ups intended to deceive not only the United States Government, but also the State Government of Colorado and its citizens into believing that Rockwell was doing a wonderful job managing the plant, safeguarding its workers, and protecting the surrounding population.

Had the United States Government known the true nature and extent of Rockwell International's violations and

conspiratorial cover-up, which cover-up in some instances involved representatives of the Department of Energy ("DOE"), the contract of Rockwell to operate the Rocky Flats Plant would have been abruptly terminated. Accordingly, no payments including costs of operating the facility, annual fees, and/or bonuses, would have been made to Rockwell International. Under the totality of the facts and circumstances as will be fully developed in this litigation, all of Rockwell's requests for such payments should be held to be false claims for which the United States Government is entitled to treble damages plus civil penalties of not less than $5000 and not more than $10,000 for each act constituting the false claims. The total amount received by Rockwell for such claims is estimated to be in the billions of dollars.

II. DESCRIPTION OF EMPLOYMENT WITH DEFENDANT AND INFORMATION OBTAINED

Shortly after Mr. Stone was hired in 1980, he began observing things at Rocky Flats which were, to the eye of an experienced engineer with Mr. Stone's qualifications, simply wrong. For example, Mr. Stone noticed that replacement cooling towers that were being ordered for the plant without technical specifications or relationship to resolving a problem. His job was to review the design criteria, drawings and specifications, for the $300 million per year Utilities Restoration Project that started in about 1981. He determined that no rational criteria had been used and that there was no justification for ordering equipment without proper engineering or relationship to resolving a problem.

When his repeated efforts failed to produce a rational solution to the unilateral replacement of almost all of the cooling towers, Mr. Stone sought assistance from the appropriate DOE engineer, a Mr. Ron Foster. This occurred in August 1981. Shortly thereafter, Mr. Stone was

"called on the carpet" about his communication with Mr. Foster.

In about September 1981, three managers, William Nichol, Sam Cerise and Robert Jensen, met with Mr. Stone regarding the communication with DOE. In that meeting, Mr. Nichol expressly told Mr. Stone that he did not want any government agency learning anything about problems or conditions that Mr. Stone may become aware of in connection with his employment at Rocky Flats. Mr. Nichol ordered Mr. Stone, in particular, not to communicate with the DOE regarding such matters, or with any government agency at all. Further Mr. Stone was told that if he violated this gag order, he would be fired. Mr. Stone's request that this order be put in writing was refused.

Throughout his employment by Rockwell, Mr. Stone encountered firsthand numerous instances of unsafe conditions, hazardous practices, engineering and construction practices creating excessive costs, and instances of Rockwell's knowing refusal to correct existing problems. He was unique in that he had "trouble shooting" duties which required him to visit many secured areas of the Rocky Flats Plant.

Mr. Stone's duties included the assessment of problems and the design or proposal of appropriate solutions. These problems and solutions were documented by Mr. Stone in various forms including his weekly reports to his immediate supervisor, and proposals or formal reports setting forth the relevant information. Mr. Stone has maintained these records and they are herewith transmitted as identified in a following section of this document.

A number of the instances of Rockwell's violations are rather straight forward, such as the refusal to properly size cooling towers and thereby reduce the Government's cost. However, some of the matters raised are technical and it is impossible to transmit herewith all of the texts, treatises, and documents containing technical information upon which said matters are based. Where possible, such material is

incorporated by reference. However, an ongoing process of communication between plaintiff and the Government is required so that the Government's understanding the plaintiff's full disclosure can be completed.

A number of the matters involve information which is in some manner protected. The protections include the following: (1) a stipulation between Mr. Stone and Rockwell as to the confidentiality of certain information obtained in the pending State Court litigation entitled Stone v. Rockwell International, et al., Case No. 86-CV-3817, Division 5, District Court, County of Jefferson, State of Colorado (the "Stone State Court Action"); (2) designations of certain documents and information produced in the Stone State Court Action as being Unclassified Nuclear Information ("U.C.N.I.") within Section 148 of the Atomic Energy Act of 1954 (42 U.S.C. §2168); (3) a protective order, entered February 3, 1989, in the Stone State Court Action restricting dissemination of information obtained by Mr. Stone through orders compelling discovery; (4) the fact that certain information is classified and relates to national security; and (5) a confidentiality agreement in another federal case involving Rockwell International.

In accordance with these protections a number of documents submitted herewith are submitted under seal because the documents are subject to the aforementioned stipulation, U.C.N.I. classification, or state court protective order. Presently there is pending in the Stone State Court Action a petition by McGraw-Hill, Inc., dba KMGH-TV, Channel 7, which seeks to have the protective order rescinded. In the interim, the handling of the sealed records transmitted herewith is to be determined by the representatives of the United States Government into whose possession said sealed records are transmitted pursuant to the requirements of the False Claims Act.

Information which Mr. Stone understands to be classified is not transmitted as a part of this statement. However Mr. Stone is willing to meet with the appropriate

Government representatives to discuss such matters as may be necessary for the Government's purposes in responding to this action.

Subject to limitations discussed above, the following is a list of hazardous conditions, unsafe practices, and improper engineering or construction techniques about which Mr. Stone has acquired personal knowledge and information.

1: Beryllium contamination and the refusal to implement solutions. In 1984, DOE issued a report documenting beryllium contamination of a Rocky Flats worker due to excessive exposure to airborne beryllium. (See Exhibit "H" in Box I). Rockwell responded by appointing a blue-ribbon committee, including Mr. Stone as the lead engineer, with a priority assignment to identify and resolve any beryllium contamination problems associated with beryllium operations, in particular in the beryllium shops of Building 444. Mr. Stone, through his own research and investigation efforts, discovered startling facts including: (a) in 1975, Rockwell failed to implement a known set of testing procedures for determining personal contamination in beryllium workers; (b) that the air filter monitoring devices installed at Rocky Flats to detect airborne beryllium had, for many years, given significant-ly and consistently low readings of airborne beryllium due to an electrostatic repulsion effect; (c) that the exhaust ventilation system used in Building 444 to control beryllium dust was defec- tive and incapable of reducing levels below legally required minimum; (d) that other industries in which beryllium was machined had adopted the "wet" method of machining beryllium in order to effectively control the airborne beryllium hazard; (e) and that substantial deposits of dust and particulate matter, most probably containing a significant amount of beryllium, had accumulated in the ventilation duct work of Building 444.

Mr. Stone proposed to the committee a modified form of "wet" machining be used at Rocky Flats coupled with a beryllium chip recovery process which Mr. Stone designed.

Such system, as designed, would not only control the dust hazard at the source, but also increase the recovery of government property in the form of recyclable beryllium wastes, and allow for better machining of the part. The committee favored the idea and a research and development team was appointed, including Mr. Stone, to conduct testing to determine the feasibility of using the "wet" machining for the beryllium components which are ultimately included in the nuclear warhead triggers manufactured at Rocky Flats. A "wet" machining apparatus was built and sophisticated testing determined that the parts were as good or better as the parts normally machined without the "wet" process.

Despite the advantages of "wet" machining, Rockwell rejected the proposal, along with Mr. Stone's proposed solutions, in favor of a revamping of the exhaust ventilation system in place. According to testimony obtained in the Stone State Court Action, the decision to go with the revamped system was based on verbal reports of the claimed success, as supported by inadequated documentation and measurements, of a similar system at the British counterpart to Rocky Flats in England. (Rockwell has refused to produce the British documentation on the basis that it is the property of the British Government and the British Government does not consent to its production. But Mr. Stone has reviewed the documentation.)

Also, in the Stone State Court Action, significant documentation, including photographs, has been obtained as to the above matters. However, with some exceptions, this information is presently under the above referenced protective order.

Detailed information has been obtained as to the extent of beryllium related diseases among certain Rocky Flats workers, which information and records are under a confidentiality stipulation. These records, as other protected records, are transmitted herewith under seal for the Government's handling in accordance with the applicable law governing said protections. Unfortunately

copies of some of the records, in particular some drawings and photographs, have not yet been produced by Rockwell in the Stone State Court Action, despite a court order to do so.

2. Air Duct Contamination, Building 881. In connection with Mr. Stone's work on remodeling of a portion of the air handling systems for Building 881, he proposed methods for the decontamination and/or removal of exhaust duct work which, after having been in place for many years in Building 881, had become highly contaminated with many radioactive and toxic substances. At the time, the hazardous uses of Building 881 had been cut back to a single small laboratory so that other portions of the building could be remodeled for use by unprotected office workers. Mr. Stone saw no purpose in leaving in place the large system of contaminated duct work when a separate system could be installed and dedicated to the single small laboratory handling hazardous substances. Mr. Stone objected to leaving in place the contaminated duct work, which most probably contained significant particulate deposits of hazardous wastes including concentration of plutonium and other radioactive materials, because an accidental rupture, discharge, or other incident allowing the contamination to exit the duct work into the interior of the building could cause injury to the unprotected office workers. Despite the knowledge that Mr. Stone was correct, his proposals were not implemented.

3. Criticality hazards. Mr. Stone is the source of information for recently initiated investigations into the potential and/or past occurrence of criticality incidents at Rocky Flats plants involving uncontrolled or excessive nuclear chain reactions caused by mishandling or inadvertent concentrations and configurations of such nuclear material as plutonium. One of these investigations is being conducted by the news media, in particular Denver TV Station KMGH, Channel 7, which, as a result of information from Mr. Stone, submitted a Freedom of Information Act Request to DOE. A portion of the results

of that request were released on a June 19, 1989 special broadcast entitled "Critical Mass" which contained interviews and discussion with Governor Roy Romer, James Stone, and Congresswoman Pat Schroeder, and University of Colorado Professor Niel Schoenbeck.

It was known that there have been numerous criticality alarms, and numerous failures of criticality alarms over the past ten years at Rocky Flats. In connection with the Stone State Court Action, documentation has been obtained by Mr. Stone which indicates in 1987, levels of contamination in Building 881 that could cause criticality. One of those documents is not protected in that it was filed as an exhibit with the state court prior to the entry of the protective order. Attached hereto has Exhibit "B" is a true copy of that document which is a Title II Review, dated March 27, 1987, regarding the Renovation of Building 881, with attached "post-it" notes (document numbers 8266 and 8267). One of the attached "post-it" notes indicates that Room 127 "looks like" the only room "that will contain levels that could cause criticality". Notes on the "Comments" portion of the document indicate that Criticality Engineering must be consulted and that "All personnel working in areas of this renovation where [plutonium] may be encountered must complete appropriate nuclear criticality safety training prior to starting the job."

This information and Mr. Stone's efforts have also resulted in a request by the offices of Senator Tim Wirth and/or Congressman David Skaggs that the Nuclear Regulatory Commission investigate criticality incidents and the potential for criticality incidents at Rocky Flats. Mr. Stone is in the process of gathering documentation relating to this request for investigation, as well as those documents obtained from the Department of Energy pursuant to Mr. Stone's information. Copies will be provided to the Government as soon as possible.

4. Improper, outdated, and excessively costly airfiltration systems at Rocky Flats. As a result of his work

on the air exhaust system at Building 881, and other areas, Mr. Stone discovered that the technique used for filtering air exhausts throughout Rocky Flats, i.e., remote multiple HEPA filters, was, through outdated design and improper maintenance and servicing, creating a hazard and/or potential hazard that ruptured filters containing excessive particulate contamination could spew radioactive material into the atmosphere. Mr. Stone also discovered that a superior HEPA mini-pleat filter, when installed in connection with a pre-filter designed to remove the larger particulates from the air stream, would both filter the air more effectively and reduce the plant wide cost of air filtration by millions of dollars per year.

Mr. Stone engaged in repeated and protracted efforts to have the superior filtration system implemented. He verified state of the art technology with other agencies and manufacturers. He conducted independent research and testing. However, all of Mr. Stone's efforts were defeated by improper means or objections to the new filters which were not based on sound engineering analysis. For example, the new filter was rejected after Rockwell conducted hot air tests on the wrong model of the filter. Had the correct model been used, the filters would have passed the test.

5. Leaking glove boxes with inoperable safety valves. Mr. Stone learned that glove boxes, in particular those in Building 771, had unacceptably large leaks and gaps in their construction, such being revealed by a simple light test. Mr. Stone further observed that safety valves connected to the glove boxes, so-called "dump valves", were either capped off so as not to be connected to the safety vacuum system or were inoperable when tested. These valves, at an approximate cost of $6,000 apiece from the supplier, were not, despite these facts, subjected to scrutiny or replacement by Rockwell.

6. Material balance. This engineering technique which, in the case of physical materials, involves an accounting

system which shows missing or lost material when the amount of material going into a given process or location is balanced against the amount of material leaving that process or operation. Mr. Stone applied this technique to various critical materials, in some cases those critical to the national defense, which application reveals significantly large amounts of said material, being government property, not to be accounted for. This technique and its implications was relayed by Mr. Stone to the Federal Bureau of Investigation ("FBI") which developed and applied said concept in its recent search warrant application, dated June 6, 1989, filed with the U.S. District Court, District of Colorado, for example at pages 34 through 38 of the application signed by a Jon Lipsky, in order to show probable cause that violations of the Resource Conservation and Recovery Act ("RCRA") had occurred. The same technique has been applied by Mr. Stone in his analysis of other materials, the details of which cannot be set forth in this statement as it would involve classified information.

7. Classified. Mr. Stone has knowledge and information that Rockwell has failed to apply new technology, developed under contract with DOE, which if applied would increase the quality of the final products, being Government property, delivered to the Government in connection with its Rocky Flats operations. Said information is classified and bears upon matters of national security. Accordingly Mr. Stone cannot set forth said information in this document.

8. Groundwater contamination. Mr. Stone prepared and proposed an intercepter trench system which, if installed in the appropriate geologic and geographic location at Rocky Flats, could be used to remediate the groundwater contamination hazard that exists as a result of the operations of Rocky Flats. This proposal was not implemented. Mr. Stone has information that Rockwell and the DOE worked together to prevent discovery of groundwater contamination problems at Rocky flats.

Attached hereto as Exhibit "C" is a true copy fo a July 14, 1986 DOE memorandum to the Assistant Secretary for Defense, and others, along with a copy of a DOE briefing for meetings with Admiral Foley, and others. Said documents which were provided by Mr. Stone to the FBI reveal efforts to frustrate state and federal environmental regulation and enforcement, including suits by private individuals. Portions of these documents, for example Section II.C. of the Briefing (document 3287), indicate a knowledge that Rocky Flats was not in compliance with said laws, including RCRA. This document is quoted in the application of Agent Jon Lipsky, at paragraph 5.29, page 43. Among the uoted language is an admission that there were virtually no RCRA groundwater monitoring wells at Rocky Flats.

9. Modules J and K excursions, Building 707. An "excursion" is an outflow of contaminated material from its intended containment to a non-contaminated area. Mr. Stone was aware of excursions in these modules. An inexperienced engineer was allowed to prepare a design to remedy the problem. The design should have been routed to Mr. Stone for his review. But, due to an effort to circumvent Mr. Stone and his practice of pointing out real problems, this review was avoided. By happenstance, the design came to Mr. Stone's attention and he observed a fundamental error which called for air duct configuration that would have increased the chance of further excursions. The design violated fundamental Rocky Flats/DOE design criteria. This is one of numerous instances of such violations noted by Mr. Stone.

10. Asbestos removal standards. Mr. Stone was requested to prepare written standards for the removal of asbestos. Despite his promptness and the correctness of these standards, their approval was substantially delayed for improper reasons.

11. Wind site heating system. Mr. Stone discovered excessive economic waste in this project involving a building purportedly designed by an outside engineer to be a 100%

solar heated building which would not require any backup heating. An electric heater was installed purportedly to test the electrical power generated by the wind generator, but for the real purpose of heating the building which was a costly failure.

12. Illegal incineration of wastes at Building 771. One of the primary aspects of the recently initiated FBI investigation of Rocky Flats is the allegation of illegal mixing and burning of wastes in Building 771 using outdated equipment for which there is no permit. Mr. Stone had firsthand knowledge of this practice and relayed that knowledge, as well as the identity of individuals willing to relay similar knowledge, to the FBI. Further, Mr. Stone informed the FBI as to methods for effective detection of illegal incineration which information was utilized by the FBI in its investigation.

13. Energy conservation. Mr. Stone prepared and presented a number of energy saving proposals which, if implemented, could have reduced the cost of power used at Rocky Flats by up to 50% or $3,000,000 per year. One of these proposals was "peak load shaving" which calls for the plant to use its emergency power generators during periods of peak power usage. Tremendous savings in the cost of power purchase would have been created since the rate paid for power is based on the amount of power drawn from the public utility during peak periods. These proposals were rejected despite their validity.

14. Analysis of pond crete method for drainage of solar evaporation ponds. Solar evaporation ponds have, for some time, been used to treat RCRA hazardous wastes. Mr. Stone reviewed a design for the process and mechanical system intended to be used for removing sludge from these ponds. The system was proposed by a Mr. Leon Fong. Based on Mr. Stone's years of experience in the handling of sewage and sludge, he immediately recognized that the design could not work and would lead to serious problems. For example, the system was designed to remove sludge

from the pond and mix that sludge with cement in order to create blocks of "pond crete" for disposal use. Mr. Stone foresaw that the piping system would not properly remove the sludge and would lead to an inadequate mixture of sludge/waste and cement such that the "pond crete" blocks would rapidly disintegrate thus creating additional contamination problems.

Mr. Stone's advice, which involved alternatives, was rejected and the system was built as improperly designed. As shown by the FBI's search warrant application, at page 89, this system failed on at least one occasion during 1988 when Pond 207A was being drained for mixing, in Building 778, to form "pond crete" blocks. Mr. Stone's information also led to the FBI's broader investigation of Solar Evaporation Ponds and their misuse by Rockwell.

15. PVC piping failure, water treatment plant. In one incident, a high pressure PVC piping exploded sending shards of PVC across a room with sufficient velocity to kill or injure a person Contrary to Mr. Stone's advice to his supervisor, Anthony Eden, the piping was re-installed in the same configuration as before, despite Mr. Stone's objection that shock absorbers must be installed to prevent re-occurrence.

16. Inadequate designs. Mr. Stone continually found himself reviewing designs for various projects which designs were obviously inadequate or excessively expensive. For example, he reviewed a design for a locker room addition prepared by a young engineer named Kitt Dorr, the son of the Plant's General Manager. The building was a slab-on-grade, block wall, construction which should have cost approximately $50 per square foot to construct. However, Kitt Dorr's design and estimate called for a cost of $175 per square foot.

17. Cooling water distribution problem. Mr. Stone analyzed a reported problem involving a shortage of cooling water at some stations. He observed that the piping system for delivery of cooling water was improperly designed.

Others proposed the solution of purchasing larger cooling towers. Mr. Stone's analysis was rejected and the larger towers were purchased. The larger towers did not solve the problem and Mr. Stone again analyzed the problem. However, the piping solution could not be implemented because the allowed budget had been exhausted by the purchase of the new towers.

18. Non-nuclear production building 460, equipment overexpansion joints. Mr. Stone discovered that critical machines, such as huge automatic lathes, had been installed, per the design of an outside designer, overexpansion joints. This clearing error causes these machines, which must be installed to very fine tolerances, to be subjected to continual variation and movement when the building moves at its expansion joints. This was reported to Mr. Eden, Stone's supervisor. Mr. Stone also discovered an erroneous design for cooling of the machining processes which should have been accomplished by direct liquid cooling at the point of machining, instead of air conditioning of the entire high bay manufacturing building volume.

19. Production support building 130, value engineering error with motors. Mr. Stone's critique fo an excessively costly HVAC system was rejected on the basis of a manufacturer's computer calculations which were known to be biased by improper input data as to the efficiency of the motors to be used. A proper value engineering analysis using a technique known as "life cycle cost analysis" would have shown Mr. Stone's alternative design to be far less costly. Mr. Stone's analysis was rejected even though it was known to be correct. Such a scenario occurred repeatedly with Mr. Stone's value engineering critiques, despite orders calling for value engineering to be used.

20. Logistics support building 850, fire protection system improperly designed. Mr. Stone determined and reported a failure to design this system in accordance with Rocky Flats standards. The computer generated hydraulic test of water piping design for the system indicated velocities of up to 30 feet per second which, in real

operation, would create pressure surges and knocking sufficient to pull piping elbows and cause system failures.

21. Building 771 exhaust plenum. An inexperienced engineer was allowed to violate a Rocky Flats standard which requires two exits in an exhaust plenum. Even though the Fire Department also caught the error, the engineer did not want to correct the safety violation. Mr. Stone insisted on the change, but was later charged for failing to be a "team player" and support to the engineering department by agreeing with the operating engineers who also wanted two exits from all filter plenums.

22. Security/traffic violations. Mr. Stone has information regarding such violations including the shipment of wastes to other states without notice, and the shipments of purportedly "empty" drums which did in fact contain material.

23. Safety Working Manhours. Mr. Stone has knowledge that serious injuries to employees at Rocky Flats were not accounted for in claims by Rockwell to have conducted operations for millions of manhours without injury. These claims were a factor in Rockwell's inducing the Government to pay bonuses.

24. Rockwell's personnel system. Information obtained by Mr. Stone indicates that Rockwell's personnel, or human resource, management system is flawed and defective such that individuals are promoted above their qualifications to positions having titles and levels of responsibility which said individuals could not obtain in the normal private sector for employment outside Rocky Flats. Consequently Rockwell has created a cadre or selected group of managers who are not qualified for the critical and sensitive positions they hold. Their knowledge that they could not obtain similar employment outside Rocky Flats tends to create abnormal levels of loyalty to Rockwell despite knowledge of illegal activities and unsafe practices.

25. Plutonium recovery building 371. Mr. Stone, as a result of visiting this building on many troubleshooting assignments, observed that a great deal of money was being wasted and that the operating efficiency of this vital facility

was very low. His supervisor, Mr. Eden, was manager of this building. Despite being informed of Mr. Stone's observations and suggested solutions, Mr. Eden did nothing.

26. New incinerators for radioactive waste. Mr. Stone has suggested several alternatives to the now controversial selection of the fluid bid incinerators in building 776. A proper value engineering analysis should have been conducted considering these alternatives.

Documents and information pertaining to the above matters are, to the extent presently and legally possible, transmitted herewith and identified in the following section.

III. DOCUMENTS AND INFORMATION TRANSMITTED

Transmitted herewith, with indication as to whether or not said documents are sealed, are the following:

BOX I.

1. Essential documents and data base collected in connection with Mr. Stone's employment, numbered 1 through 1085, 1200 through 1258, 1359 through 1799, 1800 through 2222, 2223 through 2663, and 2664 through 2941 (which documents are discussed, identified and correlated at great length in the pleadings of the Stone State Court Action).

BOX II.

1. List of the following pleadings and discovery items from the Stone State Court Action:

(a) Complaint;
(b) Proposed Amended Complaint;
(c) Second Answer to Amended Complaint;
(d) Plaintiff's First Set of Interrogatories, etc., and Responses thereto;
(e) Plaintiff's Combined Requests for Admission, Second Set of Interrogatories etc., and Responses

Thereto;

(f) Plaintiff's Third Set of Interrogatories and Responses Thereto (responses are sealed as they contain information covered by confidentiality Stipulation);

(g) Plaintiff's Fourth Set of Interrogatories etc., and Responses Thereto;

(h) Plaintiff's Descriptive Statement of Claims with Exhibits (contains correlations to numbered documents in Box I);

(i) Supplement and Errata to Plaintiff's Descriptive Statement of Claims;

(j) Plaintiff's Supplemental Responses to Discovery and Updated Disclosure (contain correlations to numbered documents in Box I);

(k) Affidavit of James S. Stone, dated May 19, 1988;

(l) Plaintiff's Response to Motions for Summary Judgment or Partial Summary Judgment; Affidavit of James S. Stone

(m) Exhibits to Plaintiff's Response to Motions for Summary Judgment or Partial Summary Judgment;

(n) Exhibit "H" to Plaintiff's Response to Motions for Summary Judgment, being the Department of Energy's Investigation Report of Beryllium Disease Case, issued October 1984;

(o) Motion to Supplement Plaintiff's Response to Motions for Summary Judgment, etc.;

(p) June 12, 1989 letter from defendant's counsel to Judge Barnhill, Jefferson County District Court with enclosed Motion for Leave to File Motion for Change of Venue;

(q) June 16, 1989 letter from plaintiff's counsel to Judge Barnhill;
(r) Petition of McGraw-Hill Broadcasting Company, Inc., dba KMGH-TV (Channel 7) to Rescind Protective Order, etc. (attached as exhibits are the Stipulation and Protective Order restricting dissemination of information);
(s) Plaintiff's Joiner and Brief in Support of Petition to Rescind Protective Order, etc.

2. Bound volumes including:

(a) May 16, 1988 deposition of Anthony Eden;
(b) February 19, 1988 deposition of Larry Ferris;
(c) August 28, 1987 deposition of James Stone;
(d) May 12, 1988 deposition of James Stone;
(e) September 15, 1988 deposition of James Stone;
(f) September 16, 1988 deposition of James Stone;
(g) September 19, 1988 deposition of James Stone;
(h) May 16, 1988 , 1988 deposition of John Marschall;
(i) September 19, 1988 deposition of John Briggs;
(j) September 16, 1988 deposition of William Leslie;

BOX III.

1. Additional bound volumes including

(a) December 5, 1988 deposition of William Leslie (under seal per protective order);

(b) December 9, 1988 letter transmitting technical reports of John Briggs (under seal per protective order);

(c) January 20, 1989 deposition of John Briggs (sealed as under protective order);

(d) May 11, 1988 transcript of Court hearing;

(e) May 23, 1988 transcript of Court hearing;

(f) Plaintiff's Brief in Support of Motion for Partial Summary Judgment (Gonzalez v. Rockwell, U.S. District Court, No. 86-Z-1460);

(g) March 4, 1987 deposition of Michele Soule (Gonzalez v. Rockwell, U.S. District Court, No. 86-Z-1460);

(h) March 4, 1987 deposition of Joyce Bolton (Gonzalez v. Rockwell, U.S. District Court, No. 86-Z-1460);

(i) Document Nos. 3451 through 3569 with attached Rockwell Standards for Wind Design Calculations;

(j) U.S. Department of Energy General Design Criteria Manual (DOE 6430.1, 12-12-83);

2. Additional unbound documents including documents Nos. 2942 through 3087 and 3279 through 3450; and

(a) Search Warrant and FBI Application for Search Warrant (121 pages), both dated June 6, 1989, for Rocky Flats Plant;

(b) Pages 1 through 294 of FBI Receipt for Property Seized (which seized property is incorporated herein by reference);

(c) Earthquake hazard map of United States;
(d) February 1988 draft of DOE Report re Building 776/777;
(e) DOE Orders 5483.1 and 5483.1A re OSHA Program;
(f) June 16, 1989 Agreement in Principle between DOE and State of Colorado;
(g) Miscellaneous documents received and prepared, Nos. 3572 through 3596.

BOX IV (Sealed)

The enclosed records, are copies of some of the approximately 300,000 pages of records produced by Rockwell International at Rocky Flats on December 13 and 14, 1988, under court order in the Stone State Court Action. By terms of the Protective Order in said action, dated February 3, 1989, said documents are sealed in that said order restricts dissemination outside the State Court Action. Presently there is pending an application to rescind the Protective Order. Please note that the documents in this box do not include photographs and drawings which Rockwell has been ordered to produce, but which they have failed to provide as Stone has requested and paid for. All 300,000 pages of documents are reportedly maintained in the offices of counsel for Rockwell, James Abrams, Esquire, in Building 111, Rocky Flats in boxes numbered approximately 1 through 65. Additionally, the documentation regarding the air evacuation system for beryllium machining in Great Britain has not been produced.

The documents transmitted in Box IV are documents numbered by plaintiffs as 5001 through 9000 (with document Nos. 8996 through 9000 having been mailed after the document production).

DOCUMENTS NOT TRANSMITTED.

Personnel and employment records produced by

Rockwell, hand numbered as document Nos. 1 through 2764, are not produced with this transmission. Said documents involve Rockwell's records of James Stone's employment, which are not subject to the Protective Order or Stipulation for confidentiality, and personnel records of other individuals, which records are subject to the Stipulation for confidentiality.

Mr. Stone will produce or allow inspection of these records to the extent allowed by the court, as well as any others he may have which have relevance, whether marginal or otherwise, to the subject of the instant statement of information.

IV. MR. STONE IS AN ORIGINAL SOURCE OF THE INFORMATION UPON WHICH ALLEGATIONS OR TRANSACTIONS IN INVESTIGATIONS AND REPORTS IN THE NEWS MEDIA ARE BASED

Prior to the filing of this action, Mr. Stone met on a number of occasions with FBI Agent Jon Lipsky, and EPA Agent William Smith. Attached hereto as Exhibit "D" is a copy of the FBI memo of Jon Lipsky reflecting a June 25, 1987 meeting with Mr. Stone.

Throughout his meetings with the Government, Mr. Stone has provided information, key documents, and the identities of individuals who have cooperated in the investigation, at the request and recommendation of Mr. Stone.

Mr. Stone's actions have been exemplary and courageous. He is a patriot who believes the U.S. Government, and its taxpayers, are entitled to a superior national defense that is not subject to blatant contractor fraud.

Mr. Stone's information, knowledge, and allegations, form an original source of the current investigation of Rockwell International, and its operations at Rocky Flats by the Government (EPA, FBI and Grand Jury), as reflected in the FBI Search Warrant and Application therefor.

Additionally, information and knowledge obtained by Mr. Stone has led to the request for the Nuclear Regulatory Commission to investigate criticality hazards at Rocky Flats. Further, his information has prompted the Freedom of Information Request and investigation conducted by KMGH TV, Channel 7, of Denver, Colorado.

Independent of these investigations, Mr. Stone has conducted his own investigation. Through his efforts in the Stone State Court Action, he has uncovered thousands of pages of evidence, some of which is transmitted herewith, and which is not only relevant to the State Court Action, but also material to the instant action.

Mr. Stone has communicated with the Government regarding his reservation of claims under the False Claims Act. Attached herewith as Exhibit "E" is a true copy of the February 29, 1988 letter from counsel for Mr. Stone to Kenneth R. Fimberg, Assistant U.S. Attorney, confirming Mr. Stone's communication of that position during a February 17, 1988 conference with Mr. Fimberg and others.

Attached hereto as Exhibit "F" is a true copy of Mr. Fimberg's March 1, 1988 letter acknowledging Mr. Stone's position.

V. CONCLUSION

To the extent possible, the foregoing represents a statement of substantially all evidence and material information possessed by Mr. Stone. As noted in various portions of the document, some evidence is either classified, too technical, too voluminous, or otherwise not susceptible to inclusion at this time. However, Mr. Stone is ready and willing to revise and supplement his submittal of information in accordance with the Government's needs in pursuing and evaluating this matter. All communications regarding this matter should be directed through the undersigned or representatives of his law firm.

DATED: July 5th, 1989

LEEVAN & ALLEY

By: /s/ Hartley David Alley
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Plaintiff's Address

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* * *

HARTLEY DAVID ALLEY
ATTORNEY AT LAW

February 29, 1988

KENNETH R. FIMBERG
Assistant U.S. Attorney
1200 Federal Office Building
1961 Stout Street,
Drawer 3615
Denver, Colorado 80294

BLAKE STREET
DESIGN DISTRICT
1961 WAZEE STREET
SUITE 200 E
DENVER, COLORADO
80202
(302) 266-7438

HAND DELIVERED
CONFIDENTIAL

RE: JAMES S. STONE

Dear Mr. Fimberg:

This confirms my statement of Mr. James Stone's position on any claims he may have under the False Calims Act, 31 U.S.C. Sect. 3729-32, as amended in 1986, such statement made during our February 17, 1988, conference at your office. I represent Mr. Stone in connection with those claims.

As stated, Mr. Stone reserves any claims or rights he may have under the False Claims Act. He firmly believes he is the source of information that would show the contractor in question has knowlingly submitted false and fraudulent claims to the U.S. Government for payment or approval. Under the Act, Mr. Stone would be entitled to a portion of monies recovered by the government.

Although your investigation may not focus on false claims for payment, I felt it was necessary to clarify the False Claims Act position at the onset. If, for any reason, you or your office believes Stone is giving up any of those rights under the Act, please notify me at once.

Mr. Stone's continued cooperation is given in reliance on your acknowledgment of his position stated above.

Please feel free to contact me should you have any questions or comments regarding this matter.

Very Truly Yours,

/s/ Hartley David Alley

Hartley David Alley

HDA/me
cc: Mr. James S. Stone, P.E.

[seal and portions of letterhead omitted]

U.S. Department of Justice

United States Attorney
District of Colorado

Byron G. Rogers Federal Building
Twelfth Floor, Drawer 3615
1961 Stout Street
Denver, Colorado 80294

March 1, 1988

[Received]
[Mar 3 1988]

CONFIDENTIAL

Hartley David Alley, Esq.
1961 Wazee Street, No. 200E
Denver, Colorado 80202

Re: James S. Stone

Dear Mr. Alley:

Thank you for your letter dated February 29, 1988. As I indicated previously, our investigation of various activities at the Rocky Flats nuclear facility is ongoing and only started recently. While we sincerely appreciate Mr. Stone's assistance, it is unclear at this time whether our investigation will focus upon or result in any charges or allegations as to false contract claims or requests for payment. We therefore acknowledge your letter and Mr. Stone's position, but cannot make any further representations or agreements at this time.

Again, we appreciate your cooperation and look forward to meeting with you further.

Sincerely yours,

/s/ Ken Fimberg

KENNETH R. FIMBERG
Assistant U.S. Attorney

KRF:mjg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-C-1154

UNITED STATES OF AMERICA
ex rel. JAMES S. STONE,

Plaintiff,

v.

ROCKWELL INTERNATIONAL
CORPORATION,

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

Preliminary Statement

In 1986, James S. Stone alerted the Federal Bureau of Investigation and the Environmental Protection Agency to serious environmental, health and safety problems resulting from defendant Rockwell International Corporation's

operation of the Rocky Flats nuclear weapons plant. Stone's detailed personal knowledge of the problems at Rocky Flats, and his access to documentary support, were a result of his six years' work for Rockwell as an engineering "troubleshooter" at Rocky Flats.

Over the next three years, Stone met at least three more times, and had several telephone conversations, with government investigators. He turned over thousands of pages of relevant Rockwell documents. He told the government where to look for more key documents and evidence. And he provided names of additional people who would corroborate his story.

Stone advised the federal authorities that Rockwell was contaminating the surface and ground water at Rocky Flats. He told them that Rockwell was ignoring substantial accumulations of radioactive materials, including plutonium, hidden in building exhaust air duct systems that threatened the health of Rockwell's workers. And he alerted the authorities that Rockwell was exposing its workers to dangerous levels of beryllium, an extremely toxic metal known to cause the deadly lung disease berylliosis. Given Rockwell's continued operation of Rocky Flats, Stone had every reason to believe that Rockwell had failed to disclose these serious environmental, health and safety problems in order to continue receiving tens of millions of dollars in annual compensation from the United States.

Stone was correct that Rockwell had failed to inform government authorities of its continuing environmental problems. The United States Government soon commenced a criminal investigation that resulted in the unprecedented issuance of a search warrant for a Department of Energy facility; an unannounced FBI raid of Rocky Flats; the termination of Rockwell's contract with the United States Government; the first-ever empaneling of a special grand

jury in the District of Colorado; a three-year criminal investigation; and, ultimately, Rockwell's plea to ten criminal violations (five felonies) of the environmental laws and payment of the largest federal hazardous waste fine in the history of the United States. Stone was hailed in the press and by congressional leaders as the man who had "blown the whistle" on Rockwell's crimes at Rocky Flats.

Against this backdrop, Rockwell now seeks to dismiss Stone's False Claims Act ("FCA") case on the ground that Stone allegedly was not an "original source" of the information upon which his complaint is based. Rockwell offers two arguments. First, Rockwell contends that Stone's case is a "parasitic," "copycat" suit that "plagiarized" already public allegations of Rockwell's environmental violations contained in such documents as the search warrant issued for Rocky Flats. Alternatively, Rockwell argues that even if Stone was an "original source" of the facts underlying Rockwell's environmental, health and safety problems (as indeed he was), this case still must be dismissed because Stone does not have direct and independent knowledge of the specific false statements and omissions that Stone contends Rockwell made to the government to obtain its semi-annual payments for operating Rocky Flats.

Both of Rockwell's arguments are meritless. As we demonstrate below, far from a "copycat" lawsuit, Stone's is a textbook "whistleblower" case. Stone's allegations of Rockwell's environmental, health and safety problems are based on his direct and independent knowledge gained through six years of work at Rocky Flats and disclosed to the government prior to the commencement of this lawsuit -- precisely as required by the "original source" provisions of the FCA. The fact that Stone's allegations mirror in some respects the public allegations resulting from the criminal

investigation into Rockwell's operation of Rocky Flats is not because Stone "copied" them. Rather, it is because the public allegations themselves stemmed in part from the information that Stone disclosed to the federal authorities in the first place. Rockwell's "copycat" argument is completely backward.

As for Rockwell's second argument, the FCA does not require a qui tam plaintiff to be an "original source" of the specific false statements or concealments alleged in his lawsuit, as opposed to being an "original source" of the underlying facts that make the statements or concealments false or fraudulent. Indeed, if Rockwell's view of the law were correct, the only inside "whistleblowers" who would qualify as plaintiffs under the FCA would be those that worked in a company's compliance or contract office and therefore had direct knowledge of the company's permit applications, environmental certifications or submissions to the government for payment. The entire class of employees like Stone -- who work on the "shop floor" and, as a result, are in the best possible position to know of a company's fraudulent government contract practices -- would be eliminated entirely as qualified *qui tam* plaintiffs. This overly narrow and, we submit, nonsensical, reading of the FCA contradicts its statutory language, its legislative history, its underlying public policy, and every case to touch on the issue.

As we demonstrate below, James S. Stone is precisely the type of "whistleblowing insider" that Congress had in mind when it enacted the *qui tam* provisions of the FCA. He is an "original source" of the information on which the allegations of his complaint are based. Accordingly, Rockwell's motion to dismiss should be denied, and the Court should enter an Order finding that subject matter jurisdiction exists and permitting this case to proceed to

trial.

Statement of Facts

The facts relevant to the instant motion are set forth in the Affidavit of James S. Stone, sworn to February 27, 1993, and the exhibits attached thereto ("Stone Aff."). They are summarized below.

James S. Stone ("Stone") was employed by defendant Rockwell International Corporation ("Rockwell") as an engineer at Rocky Flats from November 1980 until March 1986. (Stone Aff. ¶ 2) During his employment, Rockwell operated Rocky Flats under a contract with the United States. (Id. ¶ 28) Stone was aware during his tenure at Rocky Flats that Rockwell was required to operate Rocky Flats in accordance with federal, state and local environmental, health and safety laws. (Id. ¶ 29) Stone also learned while at Rocky Flats that Rockwell's compensation under its contract with the United States was based in part on Rockwell's satisfactory performance in various subject matter areas, including environmental protection. (Id. and Ex. L)

Stone's job at Rocky Flats was essentially to serve as a roving engineering "troubleshooter." (Stone Aff. ¶ 3) In this capacity, Stone was assigned to numerous projects throughout Rocky Flats that required him to learn about, and recommend solutions for, various environmental, health and safety issues at the plant. (Id. and Exs. A, C-K) Specifically, Stone worked on projects concerning, among other things: (a) the operations of the Rocky Flats' sewage treatment plant, and related problems with the disposal of toxic wastes (Id. ¶¶ 4-16 and Exs. A, C-E); (b) the handling of radioactive plutonium by Rocky Flats workers and the safety devices employed by Rockwell in this regard (Id. ¶¶ 17-24 and Exs. A, F-J); (c) the refurbishing of the exhaust

air duct systems in various Rocky Flats buildings (Id. ¶¶ 17-27 and Exs. A, F-K); and (d) the handling of beryllium by Rocky Flats workers and the safety devices employed by Rockwell in that regard (Id. ¶¶ 25-27 and Exs. A, K).

During the course of Stone's work outlined above, he discovered serious environmental, health and safety problems in each of these general subject matter areas. Stone analyzed and reported what he viewed as serious environmental concerns involving ground and surface water contamination stemming from the misuse of spray irrigation methods, the improper treatment, storage and disposal of industrial and radioactive wastes, and the poor operations and maintenance of the Rocky Flats sewage treatment plant. (Stone Aff. ¶¶ 4-16 and Exs. C-E) He uncovered substantial and dangerous flaws in the "gloveboxes," safety valves, filters and related safety devices purportedly employed by Rockwell to protect its workers from exposure to deadly radioactive plutonium. (Id. ¶¶ 17-24 and Exs. F-J) He alerted Rockwell to what he concluded (correctly) would be a dangerous accumulation of plutonium dust in the exhaust duct systems of buildings that Rockwell intended to refurbish as office space for Rocky Flats administrative workers. (Id.) And he concluded that there was a virtual absence of effective worker safety equipment in those areas of Rocky Flats where Rockwell workers handled toxic beryllium. (Id. ¶¶ 25-27 and Ex. K)

In each area outlined above, Stone personally observed the problems at issue and directly participated in analyzing and proposing solutions, virtually all of which Rockwell rejected. (Stone Aff. ¶¶ 4-27 and Exs. A, C-K) The information obtained by Stone in these three general areas, i.e., (1) surface and ground water contamination and waste treatment, storage and disposal, (2) plutonium and (3) beryllium, directly match the three primary categories of

alleged violations that underlie Stone's FCA lawsuit here, as set forth in detail in Stone's Consolidated Answers and Responses to Discovery dated October 27, 1992 (the "Consolidated Discovery Responses"). (Id. ¶¶ 3, 38 and Ex. B)

Beginning in the fall of 1986, after he was terminated by Rockwell, Stone voluntarily contacted the FBI to discuss some of the environmental, health and safety problems of which he had personally become aware during his six years at Rocky Flats. (Stone Aff. ¶ 31) During the next three years, and prior to filing this lawsuit, Stone met secretly on at least three more occasions with FBI and EPA agents and, on one occasion, with an attorney with the United States Department of Justice ("DOJ"). (Id. ¶¶ 31, 33-34 and Exs. M-O) He also had several telephone conversations with the FBI. (Id. ¶¶ 31, 34 and Ex. O) Several of these contacts were memorialized in memoranda by the FBI. (Id. ¶¶ 32-34 and Exs. M-0) Other contacts apparently were not recorded. (Id. ¶ 32)

During the course of these meetings, Stone disclosed to government authorities, among other things, much of the factual information he had learned and collected concerning the serious environmental, health and safety problems at Rocky Flats at issue in this lawsuit -- ground water contamination; storage, handling and disposal of wastes; and plutonium and beryllium health and safety issues. (Stone Aff. ¶¶ 31-34 and Exs. M-O) Stone voluntarily provided the FBI with over 2,300 pages of pertinent documents. (Id. ¶ 31) Numerous of these documents related directly to the environmental, health and safety concerns at issue in this case, as articulated in Stone's Consolidated Discovery Responses. (Compare, e.g., id. Exs. M-0 with Stone Aff. ¶ 38 and Ex. B) Stone provided the FBI with names of additional persons with likely knowledge of Rockwell's

activities, as well as recommendations as to where the FBI might best locate additional relevant documents and evidence. (Id. ¶ 31 and Exs. N-0)

In addition, in August 1986, shortly after Stone's employment with Rockwell was terminated, Stone filed a civil complaint against Rockwell for breach of contract in state court in Jefferson County, Colorado ("State Court Complaint"). (Stone Aff. ¶ 36 and Ex. P) In the State Court Complaint, Stone alleged some of the same facts concerning Rockwell's environmental problems involving wastewater, beryllium and plutonium contamination as are at issue in this FCA lawsuit. (Id. Ex. P, pp. 6, 9) The State Court Complaint was filed nearly three years before the information about Rockwell's environmental, health and safety violations at Rocky Flats became public in June, 1989, when the FBI raided Rocky Flats.

It was only after Stone's meetings with government authorities and the filing of the State Court Complaint that the search warrant was issued in connection with Rocky Flats that resulted in the publicized raid on the plant and the release on June 9, 1989 of the affidavit on which the warrant was based. (Koenigs Aff. Exs. 1, 2[1/]) The search warrant affidavit was signed by Jon S. Lipsky, the very same FBI agent with whom Stone first met, and who attended every subsequent meeting with Stone. (Stone Aff. ¶¶ 31-34 and Exs. M-O)

Finally, simultaneously with the filing of this lawsuit on July 5, 1989, Stone submitted a Confidential Disclosure Statement of Material Evidence and Information to the government (Stone Aff. ¶ 37 and Ex. Q), together with four boxes of documents relevant to the allegations in this

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[1/] Refers to the Affidavit of Christopher J. Koenigs, submitted in support of Rockwell's motion to dismiss.

lawsuit. Stone continued to supplement his Disclosure Statement with additional documentation. (Id. ¶ 37) Both the Disclosure Statement itself and the documents provided to the government made specific reference to the subjects at issue in this case. (Id. ¶ 37 and Ex. Q, pp. 9-17, 19-20, 23-30)

In short, over the course of six years, Stone obtained direct, independent, and personal knowledge of the facts underlying Rockwell's problems in the area of environmental, health and safety compliance, and the associated violations of applicable laws, in each of the specific subject matter areas at issue in this lawsuit. Based on this information -- and the fact that the government continued to permit Rockwell to operate Rocky Flats despite these facts -- Stone commenced this lawsuit alleging violations of the FCA. (Stone Aff. ¶ 35)

As we show below, based on Stone's direct and independent knowledge as set forth in his accompanying affidavit, Stone plainly satisfies the "original source" jurisdictional requirement of the FCA.

Argument

PLAINTIFF IS AN "ORIGINAL SOURCE" OF THE INFORMATION ON WHICH THIS LAWSUIT IS BASED

A. Stone Has Direct and Independent Knowledge of the Facts Underlying the Environmental, Health and Safety Issues in This Case

Where, as here, an FCA case is "based upon the public disclosure of allegations in . . . a criminal hearing . . . or from

the news media,"[2] the FCA requires: "(1) a qui tam plaintiff must have direct and independent knowledge of the information on which the allegations are based; and (2) a qui tam plaintiff must have voluntarily provided such information to the government prior to filing suit." United States ex rel. Precision Co. v. Koch Indus., 971 F.2d 548, 553 (10th Cir. 1992), cert. denied, __ U.S. __, 1993 U.S. LEXIS 1689 (1993) (quoted in Def. Br.[3] at 11-12).[4]

Plaintiff plainly meets both of these tests. Based on the facts and documents set forth and referred to in the Stone Affidavit, as summarized above, there can be no genuine issue that Stone had direct and independent knowledge of the environmental, health and safety issues raised by his lawsuit. He worked at Rocky Flats for six years, and he had

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[2] Plaintiff does not dispute Rockwell's contention (Def. Br. at 2-5, 9-11) that some of the allegations in this case had been publicly disclosed in a criminal investigation and/or in the news media at the time the suit was commenced. Accordingly, for those claims that arguably were publicly disclosed (i.e., some aspects of the ground water contamination, plutonium and beryllium allegations), plaintiff must satisfy the "original source" requirement of 31 U.S.C. § 3730(c)(4)(A). We therefore assume for purposes of this motion that Stone must meet the "original source" requirement for these broad areas of claims. However, Rockwell has presented no evidence whatever that Stone's claim regarding the heating and cooling of Building 250 at Rocky Flats, see Stone Aff. Ex. B, Att. 4, was in any respect public prior to Stone's suit. Thus, the "original source" rule is not triggered with respect to that claim.

[3] References are to Rockwell's Brief in Support of Defendant's Motion to Dismiss Plaintiff's Complaint Under Rule 12(b)(1) for Lack of Subject Matter Jurisdiction, dated December 15, 1992.

[4] In footnote 1 of its brief, Rockwell cites United States v. Murphy, 937 F.2d 1032, 1036-38 (6th Cir. 1991), for the proposition that Stone's claims are governed by the pre-amendment FCA. In making this argument, Rockwell ignores this Court's own prior decision holding that the 1986 amendments to the qui tam provisions of the FCA are to be applied retroactively. United States ex rel. Navarette v. Rockwell Int'l Corp., 730 F. Supp. 1031, 1032-35 (D. Colo. 1990).

virtually daily exposure to the ground water, surface water, waste treatment, plutonium and beryllium issues at the core of his case. It is difficult to imagine a *qui tam* plaintiff who better satisfies the "direct and independent knowledge" requirement of the FCA. See United States ex rel. Stinson v. Prudential Insur. Co., 944 F.2d 1149, 1161 (3d Cir. 1991) ("The paradigmatic 'original source' is a whistleblowing insider. This covers . . . 'individuals who are close observers [of] the fraudulent activity.'").

Nor can Rockwell genuinely dispute that Stone provided his information to the government prior to commencing his lawsuit. Stone met and spoke with the FBI and EPA on numerous occasions. He provided thousands of pages of relevant documents. He turned over still more documents as part of his confidential disclosure statement -- all prior to or simultaneous with the filing of his FCA complaint. Once again, Stone fits the definition of "original source" like a glove.

Rockwell stresses in its brief (at 8) that it is attacking subject matter jurisdiction in this case "as a matter of fact, rather than as a matter of pleadings." Yet Rockwell presents no facts that dispute Stone's direct and independent access to the information underlying his complaint. Rockwell does not (and cannot) dispute Stone's employment history at Rocky Flats. Rockwell does not (and cannot) offer any evidence that contradicts Stone's work on projects at Rocky Flats that directly relate to the alleged environmental, health and safety problems at issue. And Rockwell does not (and cannot) suggest that Stone failed to disclose this information to government authorities prior to commencing the action.

Instead, in lieu of evidence, Rockwell argues, as a matter of pure logic, that Stone must have lacked direct and independent knowledge of the environmental, health and

safety issues in this case because some of his allegations track the allegations made public in the investigations conducted by the FBI, EPA and DOJ. (Def. Br. at 13-14) ("Stone based his FCA claim on information developed by the Government in its own investigations . . . .") Further, Rockwell asserts that Stone has "admitted" that his case is based "almost entirely" on information developed by the government because Stone cites to government sources in his Consolidated Discovery Responses. (Id. at 14)

Rockwell's logic is flawed. The fact that certain of Stone's allegations of environmental, health and safety violations in part match those made public by the FBI, EPA and DOJ proves nothing where, as here, Stone had direct and independent knowledge of the underlying facts and reported them to the government before the allegations were made public.[5/] Stone's prior knowledge is corroborated by the fact that his State Court Complaint, which makes allegations concerning contaminated wastewater, beryllium and plutonium, was filed nearly three years before the outbreak of publicity involving the criminal investigation into Rocky Flats. (Stone Aff. ¶ 36, Ex. P, pp. 6, 9) Thus, if

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[5/] To the extent Rockwell contends that certain press articles (Koenigs Aff. Att. 10) dated prior to the filing of Stone's state court case constitute a "public disclosure" that precludes Stone from bringing this lawsuit, it is also incorrect. Even assuming that such articles, which describe in general terms some problems relating to the ground water at Rocky Flats, made the allegations in this case public, the "original source" rule does not require that the relator provide information to the government prior to any public disclosure of the allegations on which the suit is based. The FCA requires only that the relator have "direct and independent knowledge" of the information and have voluntarily provided such information to the government. See United States ex. rel. Precision Co. v. Koch Indus., 971 F.2d 548, 553 (10th Cir. 1992), cert. denied, __ U.S. __, 1993 U.S. LEXIS 1689 (1993). Stone plainly meets this test irregardless of the existence of any general press articles addressing certain environmental problems at Rocky Flats.

probative of anything, the similarity between Stone's allegations and those in the various government investigations into Rocky Flats is persuasive evidence that Stone's disclosures were, at least in part, a foundation on which the government's subsequent investigations were themselves based.

Carrying the logic of its argument to its ultimate conclusion, Rockwell charges Stone with "plagiarism" because his Consolidated Discovery Responses allegedly "copy" the allegations in the federal search warrant affidavit for Rocky Flats and the Government's sentencing memoranda in United States v. Rockwell. (Def. Br. at 15) But as a proper qui tam plaintiff who is an original source of the information underlying his complaint, Stone has every right to make full use in this litigation of every scrap of evidence developed by independent government agencies in the course of their various investigations into Rockwell's illicit activities. Cf. 31 U.S.C.§ 3731(d) (permitting a qui tam plaintiff to obtain the benefits of a defendant's prior guilty plea to fraud or false statements in a subsequent civil FCA case). Once jurisdiction is established, the "original source" requirement does not require a qui tam plaintiff to close his eyes and litigate the case armed solely with the information he personally learned before commencing his action.

For this reason, Rockwell's analogy between this suit and the kind of "parasitic" "copycat" suit typified by United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943), is off the mark. (Def. Br. at 12-14) In Marcus, there was no evidence whatever that the purported qui tam plaintiffs had any direct or independent knowledge of the allegations of wrongdoing on which their complaint was based. On the contrary, it was undisputed that their sole source of information was a public criminal indictment. Because the FCA statute in effect in 1943 at the time of Marcus did not

contain an original source requirement, however, the plaintiffs sere permitted to pursue their action even though, as the Second Circuit recently noted, the plaintiffs' action was "based solely on information already uncovered in the government's investigation . . . ." United States ex rel. Doe v. John Doe Corp., 960 F.2d 318, 321 (2d Cir. 1992) (citing Marcus, 317 U.S. 537 (1943)).

Here, by contrast, Stone had direct and independent knowledge of the essential facts underlying the environmental, health and safety issues in this lawsuit, and he reported these facts to the government before commencing his case. Unlike the plaintiffs in Marcus and Doe, Stone is not "capitaliz[ing] on public information" without "seriously contributing" to disclosure of the defendant's misdeeds. Doe, 960 F.2d at 321. On the contrary, Stone contributed greatly to the public disclosure of Rockwell's actions by meeting on several occasions with the appropriate government authorities, including the very FBI agent that signed the search warrant affidavit that ultimately resulted in Rockwell's guilty plea to ten environmental crimes.

Rockwell's repeated charges of "plagiarism" (Def. Br. at 14, 15) -- with full knowledge of Stone's work history and disclosures to government authorities -- is disingenuous, at best.

B. The FCA Does Not Require That Stone Have Direct and Independent Knowledge of the Particular False Statements or Omissions at Issue

Rockwell's fallback argument is that, even if Stone did have direct and independent knowledge of Rockwell's environmental, health and safety problems, he still is barred as a qui tam plaintiff because he did not have direct and independent knowledge of Rockwell's specific "false statements and concealments" to the government. (Def. Br.

at 15-17) According to Rockwell, because Stone cannot presently identify all of the specific false statements or fraudulent omissions that Rockwell made to the government regarding environmental, health and safety compliance, "Stone cannot possibly satisfy the FCA's 'direct and independent knowledge' test." (Id. at 17)

Rockwell's proposed reading of the "original source" provision is wrong as a matter of law. It is inconsistent with the FCA's statutory language, its legislative history, the applicable caselaw, and common sense.

The "original source" provision of the FCA requires that a qui tam plaintiff have "direct and independent knowledge of the information on which the allegations (of the complaint) are based." 31 U.S.C. § 3730(e)(4)(B) (emphasis added). By contrast, § 3729(a)(2) -- the liability section of the FCA -- specifically requires that the plaintiff demonstrate as an element of his claim that the defendant knowingly made a "false" or "fraudulent" statement to get a claim paid. By its plain language, therefore, the "original source" provision of § 3730 does not require that a plaintiff necessarily have direct and independent knowledge of the alleged false statements or concealments that § 3729 specifically requires as an element of liability.

Had Congress intended to require a qui tam plaintiff to possess direct and independent knowledge of the specific misrepresentations or concealments at issue – as opposed to knowledge of the underlying information that renders the statements false or fraudulent – Congress easily could have used the term "false statements" in the 3730(e)(4)(B) definition of "original source." But it didn't. Congress chose instead to employ the broader term "information" in the § 3730 definition of "original source." As one Circuit Court put it: "Congress, if it wished to do so, could have limited the statute in the manner suggested by [Rockwell]. . . .

Congress was not so specific when drafting the statute. We must interpret the statute as it is written, not how [Rockwell] wishes Congress had drafted it." United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1504 (11th Cir. 1991) (quoting United States v. Rawlings, 821 F.2d 1543, 1546 (11th Cir. 1987)).

Plaintiff's reading of § 3730 is fully consistent with the legislative history of the FCA. Congress intended that persons such as Stone, who are close observers of a government contractor's misconduct and who voluntarily come forward with such information, be entitled to bring suit as qui tam plaintiffs. See S. Rep. No. 345, 99th Cong., 2d. Sess. at 4 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5269, cited in United States ex rel. Stinson v. Prudential Insur. Co., 944 F.2d 1161, 1154 (3d Cir. 1991); False Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 3 (1990) (statement of Sen. Grassley), cited in Stinson, 944 F.2d at 1154.

Indeed, it is no exaggeration to characterize Stone as the archetype qui tam plaintiff -- the "whistleblowing insider" -- that Congress envisioned when it enacted the FCA. See Stinson, 944 F.2d at 1161. There is no suggestion in the legislative history that Congress intended to bar an insider like Stone from commencing an FCA case merely because his job did not afford him firsthand knowledge of the specific misrepresentations that form an element of his claim.

Moreover, plaintiff's view of the "original source" requirement is consistent with the statute's remedial purpose. The sole reason Congress chose in 1986 to create an "original source" requirement was to prevent qui tam plaintiffs who had no first-hand knowledge of the facts at issue from capitalizing on already public disclosures of alleged wrongdoing by government contractors. See United

States ex. rel. Doe v. John Doe Corp., 960 F.2d 318, 321 (2d Cir. 1992); Stinson, 944 F.2d at 1164. But where, as here, it is undisputed that the plaintiff is no "stranger" to the case, but, in fact, was intimately involved for six years with the specific environmental, health and safety problems at issue, no further conceivable purpose, consistent with the intent of Congress, is served by reading the statute so narrowly as to deprive the Court of jurisdiction. For, in the last analysis, it is the claims of the United States Government, not Mr. Stone's personal claims, that would be prejudiced if this case were dismissed on jurisdiction grounds.[6/]

Plaintiff's reading of the "original source" requirement also comports with a common sense understanding of the statute. Imagine a government contract that required the manufacture and delivery of solid gold widgets. If an employee on the factory floor discovered that the contractor was using gold-plated lead instead of pure gold to manufacture the widgets, and reported this fact to the government, he surely would satisfy the "original source" requirement of the statute. This would be true irrespective of whether he had any direct or independent knowledge of the precise invoices or certifications that the contractor had submitted to the government falsely representing that the widgets were, in fact, made of 100% gold. So, too, here, the fact that Stone had no personal knowledge of the particular

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[6/] It is important to note in this regard that in the plea agreement with Rockwell in United States v. Rockwell (attached hereto), the government released all civil claims it had against Rockwell relating to environmental matters at Rocky Flats which were presently known to the government on the date of the plea agreement, except, among others, those claims raised in this FCA action, which is specifically carved out as an exception to the government's release. (Att. 1, pp. 2-3) Thus, a dismissal of this action on jurisdiction grounds, for all practical purposes, arguably is a dismissal of all FCA suits against Rockwell relating to the environmental issues raised in this case.

misrepresentations that Rockwell made to the government regarding environmental, health and safety compliance at the time he commenced his suit does not disqualify him as an "original source" under the statute.

The cases also are consistent with plaintiff's interpretation of the "original source" requirement. In Wang ex rel. United States v. FMC Core., 975 F.2d 1412 (9th Cir. 1992), the plaintiff was an engineer formerly employed by the defendant, FMC Corporation ("FMC"). While in FMC's employ, Wang had prepared a four-page report suggesting proposals to remedy FMC's problems with the transmission of a multiple launch rocket system it was manufacturing under contract with the United States. The Ninth Circuit held that Wang's knowledge obtained through his work on this project satisfied the "direct and independent" requirement of the "original source" provisions of the FCA statute because he:

> had personal knowledge of the . . . transmission problems because he worked (however briefly) on trying to fix them. . . . Wang's knowledge of the transmission problems was "direct and independent" because it was unmediated by anything but Wang's own labor.

Wang, 975 F.2d at 1417.

Significantly, the Wang court nowhere suggested that the plaintiff need also have had direct and independent knowledge of the particular alleged false statements or concealments that FMC made to the government about the compliance of the multiple launch system with contract specifications. It was enough that Wang, like Stone, had direct and independent knowledge of the underlying problems. In both instances, the plaintiff reasonably could infer that these facts were not being truthfully disclosed to the government in order to get paid. Rockwell, on the other

hand, can point to no reported case where a qui tam plaintiff with direct and independent knowledge of the underlying contract violations was nevertheless barred as an "original source" because of lack of knowledge of the specific false statements at issue. See United States ex rel. Stinson v. Prudential Insur. Co., 944 F.2d 1149, 1160 (3d Cir. 1991) ("Undoubtedly, it is not necessary for a relator to have all the relevant information in order to qualify as 'independent.' . . . A party with knowledge of fraud against the Government ought to be able to maintain a qui tam action as long as he had some of the information in advance of the public disclosure." (emphasis added)).

Finally, Rockwell's proposed distinction between knowledge of the underlying environmental problems and knowledge of the specific misrepresentations or concealments would have the practical effect of repealing the private enforcement provisions of the FCA. In the real world, qui tam plaintiffs such as Stone -- who work on the shop floor and observe, first hand, the fraudulent practices of government contractors -- rarely, if ever, have direct contact with a contractor's specific written submissions to the government. Conversely, a contractor's office employees who are responsible for the reams of paperwork submitted to the government in order for the contractor to be paid will just as rarely, if ever, have first-hand knowledge of the kinds of fraudulent manufacturing practices that typically form the core of an FCA case. Under Rockwell's narrow reading of the statute, both the laborer on the factory floor, as well as the office worker drafting submissions to the government, would be disqualified as proper qui tam plaintiffs because each, in his own way, would lack the full scope of "direct and independent" knowledge that Rockwell asserts is required to prosecute an FCA claim.

This result, we submit, is not what Congress intended, not what the statute says, and not what the courts have held.

Conclusion

For all of the foregoing reasons, plaintiff respectfully requests that Rockwell's motion to dismiss be denied, and that the Court enter an Order finding that subject matter jurisdiction exists based on plaintiff's status as an original source of the information on which the allegations of his case is based.

Dated: New York, New York
March 5, 1993

Respectfully submitted,
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON

By: /s/ Bruce Birenboim
Robert E. Montgomery, Jr.
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Attorneys for Plaintiff
James S. Stone

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-C-1154

UNITED STATES OF AMERICA
ex rel. James S. Stone,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION,

Defendant.

DEFENDANT'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF JAMES S. STONE

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* * *

6. State whether you have had any oral or written communication concerning any subject relating to the Rocky Flats Plant with: (a) any Government Employee (including without limitation any agent of the United States Federal Bureau of Investigation, any employee of the United States Attorney's Office for the District of Colorado, any employee of the United States Department of Justice, or any employee of the United States Environmental Protection Agency); or (b) any member of the Special Federal Grand Jury investigating Rocky Flats, excluding formal testimony before the Grand Jury. If your answer to this interrogatory is other than an unqualified negative, with respect to each such communication:

a. Identify the person who initiated the communication;

b. State the date(s) and location(s) of the communication;

c. Describe the nature of the communication, e.g., meeting, telephone conversation, letter, written statement;

d. Identify all persons who were present at and/or participated in the communication;

e. Describe with particularity the substance of the communication;

f. Identify all documents that were reviewed, examined, discussed or referred to in the course of the communication; and

g. Identify all documents that evidence, relate to or support the existence of the communication.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89 C 1154

UNITED STATES OF AMERICA
ex rel., and JAMES S. STONE,

Plaintiffs,

vs.

ROCKWELL INTERNATIONAL
CORPORATION, a corporation,

Defendant.

PLAINTIFF JAMES S. STONE'S THIRD SUPPLEMENTAL RESPONSES TO DEFENDANT'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

The Plaintiff, James S. Stone, by and through his attorneys, HARTLEY DAVID ALLEY; BUCHANAN, GRAY, PURVIS AND SCHUETZE; McDERMOTT, HANSEN AND REILLY; and BREIT, BEST, RICHMAN AND BOSCH, P.C., hereby submits the following third supplemental responses to Defendant's First Interrogatories and Requests for Production of Documents:

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 1:

Re: Groundwater contamination, spraying of pollutants, operations concerning solar evaporation ponds, and Rocky Flats sewage treatment plant.

a) Contamination of ground water in numerous ways, spraying of pollutants upon open fields, causing discharge of

pollutants onto the ground and into the groundwater, discharge of pollutants from and into solar evaporation ponds, and illegal usage of the Rocky Flats sewage treatment plant to treat contaminants and production waste.

Based upon a course of conduct, Plaintiff believes many of the violations were virtually continuous since 1976. The dates of these violations may be in documents held or controlled by Defendant; nevertheless, it appears that Rockwell has consistently failed to abide by the requirements of RCRA since its inception in 1976, by treating, storing and disposing of hazardous wastes without complying with RCRA, 42 U.S.C. §6901 et seq. and The Clean Water Act, 33 U.S.C. §1251 et seq. No hazardous waste permit was obtained nor did the facility attain "interim status" at critical times. 42 U.S.C. §6924 and 6925. By its specific language, RCRA applies to all Federal facilities. 42 U.S.C. §6961.

a) b) c) e) and f) To date Stone is able to identify the following documents and facts related to the existence of these violations:

1. DOE Order 5480.2 (Dec, 13, 1982);

2. Legal Environmental Assistance Foundation v. Hodel, 586 F.Supp. 1163 (E.D. Tenn. 1984);

3. 10 C.F.R. Part 962;

4. Rocky Flats RCRA permit application (Nov. 19, 1980);

5. June 17, 1981 notice from EPA to DOE Area Manager Don Ofte that Rocky Flats' Part A application was incomplete;

6. July 21, 1981 response to EPA from Earl Bean of DOE requesting withdrawal of Part A permit application;

7. EPA response to DOE dated 12/15/91 re

"determination of whether permit is needed is your responsibility";

8. EPA-CDH inspection of 6/7/83 showed 21,500 pounds of RCRA hazardous waste, which greatly exceed allowable accumulation of small generator; DOE/Rockwell did not have a permit or interim status to treat, store or dispose of such wastes;

9. One 6/7/83, EPA/CDH noted twenty 55-gallon drums of hazardous wastes stored at RFP without permit since April 1982, a violation of 42 U.S.C. 6928 (d)(2) and an apparent RCRA felony;

10. On 7/18/83 DOE reported to EPA that it had withdrawn its Part A application in error since RFP did store solvents and other wastes for more than 90 days, thus indicating RFP was operated as an unpermitted and illegal facility from mid-1981 through July 1983;

11. The resubmitted Part A application estimated RFP generated, stored or otherwise accumulated approximately 13,000 pounds of hazardous wastes at RFP. Information obtained by EPA showed, in fact, that RFP generated or accumulated at best 25,227 pounds of RCRA hazardous waste in 1984, nearly twice the sum estimated in 1983;

12. RFP's revised Part A application estimated that RFP generated more than 31.6 million pounds of mixed wastes (Nov. 8, 1985) and for the first time made referral to radioactive mixed waste "land disposed units", including "spray irrigation" of wastes on open fields;

13. Part of RFP's 11/8/85 RCRA submission is Rockwell's certification that its RFP groundwater monitoring system complied with RCRA requirements. This certification was demonstrably false in light of information then known to RFP officials that three days

prior to this certification a GAO Report referred to RCRA wells as "proposed as part of future RCRA compliance." CDH inspectors tested the available wells less than one month after RIC representations and found that system inadequate, and RIC's own consultants concluded that REP could not demonstrate compliance with RCRA groundwater regulations under 40 C.F.R. §265.91(c);

14. DOE Order No. 5480.2 dated 12/13/82 required groundwater monitoring systems be established at all DOE facilities in accord with RCRA regulations at 40 C.F.R. Part 264, Subpart F, and Part 265, Subpart F;

15. Rockwell reported on 11/9/84 that RCRA monitoring wells were contaminated by salt poured into them in April 1983;

16. Rockwell was implementing or at least studying implementation of waste spraying/irrigation to dispose of contaminated groundwater, waste water and plant runoff as early as 12/80 and perhaps earlier. Stone was assigned to/and did work on aspects of the project as early as Dec. 1980. This spray irrigation of contaminants onto various fields at RFP used treated wastewater, contaminated groundwater and plant runoff and was virtually continuous until 1990.

17. These spray fields received waste water from the solar ponds and their accumulated industrial wastes, contaminated groundwater, as well as sewage plant effluent. The west spray field was closed in 1985 as a RCRA contaminated site and thereafter more wastewater was sprayed on a smaller area in the east, north and south spray fields.

18. In October 1984, Rockwell violated the RFP NPDES permit when nitrate-contaminated water from the west spray field ran off the field into McKay Ditch and

flowed downstream below permitted outfalls. Ongoing overspraying of these fields caused subsequent runoff to enter Woman Creek.

19. RIC virtually perpetually recharged the alluvial groundwater around the contaminated east trenches by spraying approximately 80 million gallons a year despite minimal evaporation loss and poor soil uptake. The spraying continued even after the search warrant of 1989 and was not terminated until 1990;

20. Air monitoring analysis over well 9-81 showed the presence of volatile organic vapors exceeding background levels, sufficient to require the sample team to wear protective suits and respirators;

21. Hydrogeologic site characterization by RIC shows that alluvial groundwater flows northeast toward the Walnut Creek drainage, and that the in-place interceptor trench system may not be adequate to capture all alluvial groundwater originating in the area of the ponds. Action Description Memorandum 11/16/89, Action description Memorandum for Solar Evaporation Pond Closure 6/16/89;

22. A screening of RFP groundwater including drinking water, surface water and groundwater occurred March and April 1985 and found volatile organic compounds in the RFP groundwater, including 6,400 ppb of trichloroethane (CEARP at v.47). The Safe Drinking Water Act, 42 U.S.C. §300f, et seq., has set maximum contaminants at zero for trichloroethylene and 200 ppb for 1,1,1 trichloroethane;

23. The RFP facility does not have a groundwater monitoring system which meets the requirements of 6 C.C.R. 1008-3 Part 264 and Part 265 according to the CDH;

24. The presence of hazardous waste in

groundwater constitutes disposal within the meaning of 6 C.C.R. 1007-3 Section 260.10;

25. A memorandum confirms that a groundwater monitoring system at RFP is essentially nonexistent and confirms that some of the waste facilities at RFP are illegal;

26. RCRA legislation required a minimum of three down gradient groundwater monitoring wells at the limit of a waste management area pursuant to 40 C.F.R. §265.91(a)(2). The RFP Part B application dated 11/28/86 notes the closest wells to the solar ponds as of 11/85 to be from 170 ft. to 580 ft. to the ponds, contrary to RCRA requirements;

27. RFP's groundwater monitoring system was not in compliance with RCRA requirements when RIC certifications were made and are grossly deficient. What was required was an assessment monitoring system under 40 C.F.R. §265.93(d). These deficiencies were noted to RIC prior to RIC's certification that they were in compliance;

28. Rockwell's NPDES reporting forms (form 2C) (1979) listed 17 potential pollutants in the RFP sewage treatment plant effluent. Thereafter, RFP applied for and received NPDES permits stating that the STP received only domestic sanitary waste, cooling tower blowdown and steam condensate, no indication of industrial or hazardous wastes.

29. Despite this, RFP's RCRA Part A application lists the STP as a RCRA hazardous waste treatment unit and acknowledges that some hazardous wastes may be entering the sanitary waste collection system. Treated sewage sludge identified hazardous wastes which should have been listed as pollutants in the RFP NPDES permit, including among others, ignitable and corrosive wastes, beryllium dust, halogenated and non-

halogenated solvents, acetone, methylene chloride, EP toxic silver, cadmium, chromium and mercury wastes.

30. RCRA requires compliance with Title 6, Colorado Code of Regulations 1007-3, Colorado Hazardous Waste Regulations 6 C.C.R. 1007-3 Parts 265 and 270. Hazardous wastes are identified in 6 C.C.R. 1007-3 Part 261. The Clean Water Act, 33 U.S.C. §1251 et seq. prohibits the discharge of any pollutants into the waters of the United States except in accord with an NPDES permit.

31. A Rockwell document entitled, "Waste Stream Identification and Characterization" (WSIC) showed that 53 industrial or non-sanitary wastes including EP toxic photographic solutions, acid rinses and EP toxic cooling tower blowdown were present in and being disposed of in the sewage treatment plant.

32. RFP's NPDES Permit, Part III (Other Requirements, Management Practices Plan) and Part II, Section A, paragraph 3 (Facilities Operation) required Rockwell to prevent or minimize the potential for toxic and hazardous releases to comply with NPDES terms and conditions.

33. The numerous toxic substances discharged into the STP greatly impaired the STP's performance, a chronic problem at RFP, due to a sludge buildup compromising effluent standards.

34. RFP's 1984 NPDES Permit, Part I, Section A, paragraph 1 (Effluent Limitations – Outfall No. 001, Discharge from Pond 3 and Part III, Section A, paragraph 5, were violated by Rockwell's bypassing facilities to maintain compliance with the terms of the permit.

35. Stone documents #'s 4, 5, 6, 7, 8, 9, 10, 11, 15-25, 113-115, 117-118, 276, 410;

36. The solar evaporation ponds are a series of

five evaporation ponds used to store and treat liquid process wastes containing high nitrates and treated acidic wastes containing aluminum hydroxide, sanitary sewage sludge, lithium chloride, lithium metal, sodium nitrate, ferric chloride, sulfuric acid, ammonium persulfates, hydrochloric acid, nitric acid, chromium, tritium and cyanide in solution, all hazardous mixed wastes.

37. Due to leaking of these solar ponds, underground interceptor trenches were installed to attempt to control seepage of contaminants into surrounding groundwater. These ponds were not listed on RFP's original RCRA Part A application and no permit or interim status to treat or store hazardous or mixed wastes were granted pursuant to RCRA.

38. Vacuum filter sludge was generated from various processes at RFP, a low-level hazardous waste toxic for cadmium, chromium and other listed hazardous wastes. This sludge was stored without RCRA compliance;

39. Commencing circa 1985, and perhaps earlier, sludges from the solar ponds were removed from time to time, mixed with Portland cement and calcium chloride and packaged as a mixture of sludge and concrete for storage and later shipping offsite. The methodology of sludge removal was reviewed by Stone in 1982 and he observed that the process would not work. Stone documents, #276;

40. Despite knowing that the make-up of the east trenches was plutonium-contaminated drums, various solvents and uranium-contaminated sewage, Rockwell sprayed large quantities of water onto the site or near the site, sending large volumes of water into the groundwater of the area, thereby contaminating the ground water of the area, despite testing of the groundwater of the area which in 1981 showed elevated nitrates, chlorine and fluoride.

41. On a scale of 1 to 10, DOE has rated groundwater contamination at RFP as a nine. DOE Environmental Survey, (Sept. 1988) at ES-2. According to DOE, groundwater contamination at RFP represents the greatest single environmental hazard at all of DOE's nuclear facilities.

42. Additional documents include:

(a) Comprehensive Environmental Assessment and Response Program (CEARP) Phase 1 (April 1986);

(b) CEARP Phase 2 (July 1986);

(c) Preliminary prioritization of sites, July 21, 1986;

(d) CEARP Phase 2 Monitoring Plan and Sampling Plan (July '86);

(e) CEARP Phase 2 Technical Data Management Plan (July '86);

(f) CEARP Phase 2 Health & Safety Plan (July '86);

(g) CEARP Phase 2 QA/QC Control Plan (July '86);

(h) Closure Plan Solar Evap Ponds (8/29/86);

(i) Assessment of Environmental conditions at RFP (Aug. 1989);

(j) Environmental Report for 1989 - EG&G;

(k) RFP FY 1990 Site Specific Plan - EG&G;

(l) Federal Facility Consent Order RFP.

d) At present, available information is unclear as to which specific Rockwell employees had knowledge of

enough facts to constitute knowledge of a violation; Plaintiff reported his numerous complaints and observations directly or through reporting channels to Bill Nichol, Sam Cerise, Bob Jensen, Tony Eden, Dave Guffy, Bob Morrison, Chuck Rose, Ken Shirk, Norm Anderson, and others not presently recalled within his unit. Other knowledgeable persons may be Dennis Murphy, John Hanchley, D.E. O'Neil and William Marschal.

e), f) & g) Pending completion of discovery, Plaintiff is unable to identify each provision violated; however, the following appear to have been violated:

1. DOE 5480.2 (Dec. 13, 1982) (Hazardous, Toxic and Mixed Waste Mgmt.) AL 5480.2 (Hazardous, Toxic and Mixed Waste Mgmt.);

2. 10 C.F.R. Part 962;

3. 42 U.S.C. 6928(d)(2);

4. 40 C.F.R. Part 264 Subpart F and Part 265 Subpart F;

5. 42 U.S.C. §300 et seq.;

6. 6 C.C.R. 1008-3 Part 264 and Part 265 and Part 270;

7. 6 C.C.R. 1007-3 Section 260.10;

8. 40 C.F.R. §265.91(a)(2);

9. 40 C.F.R. §265.93(d);

10. DOE Order 5481.1A;

11. DOE Order 6430.1;

12. National Pollutant Discharge Elimination System (NPDES) permits issued pursuant to 33 U.S.C. §1342;

13. 42 U.S.C. §6901 et seq. (RCRA) especially 6928 (d)(2)(c);

VERIFICATION

STATE OF COLORADO)
) ss.
COUNTY OF BOULDER)

I, James S. Stone, being sworn, do hereby state that the foregoing Plaintiff James S. Stone's Third Supplemental Responses to Defendant's First Interrogatories and Requests for Production of Documents are true and correct to the best of my knowledge, information and belief.

/s/ James S. Stone
James S. Stone

SUBSCRIBED AND SWORN to before me this 5th day of June, 1992, by James S. Stone.

My commission expires: 4/5/94.

/s/ Shelly A. Thomas
Notary Public

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-C-1154

UNITED STATES OF AMERICA
ex rel. James S. Stone,

Plaintiff,

v.

ROCKWELL INTERNATIONAL
CORPORATION,

Defendant.

PLAINTIFF JAMES S. STONE'S AMENDED RESPONSES TO INTERROGATORY NOS. 1(d), (1), (m), (n) AND (o), 5, 6, 7, 11(a), 12-16, 21(d), AND 23 (a), (b) AND (d) OF DEFENDANT'S FIRST INTERROGATORIES

Plaintiff James S. Stone ("Stone"), by his attorneys Hartley David Alley; Buchanan, Gray, Purvis & Schuetze; McDermott, Hansen & Reilly; and Breit, Best, Richman and Bosch, P.C., hereby submits the following amended responses to Interrogatory Nos. 1(d), (l), (m), (n), and (o) ,5, 6, 7, 11(a), 12-16, 21(d) and 23 (a), (b) and(d) of Defendant's First Interrogatories:

Interrogatory No. 1 (d), (l), (m), (n), and (o):

d. Identify all Rockwell Employees who you contend had actual knowledge of the facts constituting the violation at the time Rockwell submitted any claim to the Government that you contend was false;

l. State whether you contend that Rockwell affirmatively misrepresented to the Government that it was in compliance with the Environmental and Safety Laws (including regulations thereunder) and Agreement that you contend were violated by

virtue of such facts;

m. If your answer to subpart (l) above is other than an unqualified negative, identify (in accordance with Instruction Nos. 9-10 above) each document or oral communication in which Rockwell made such misrepresentation to the Government;

n. State whether you contend that Rockwell concealed from the Government the facts constituting the violation of the Environmental and Safety Laws and Agreements;

o. If your answer to subpart (n) above is other than an unqualified negative; (i) identify all Rockwell Employees who to your knowledge concealed the violation from the Government, and (ii) identify all documents supporting your contention that Rockwell concealed the violation from the Government;

Amended Response to Interrogatory Nos. 1(d), (l), (m), (n) and (o):

The persons identified in the "Individuals" column of Attachments 1 through 4 of Plaintiff's Consolidated Answers and Responses to Discovery are persons whom Stone believes had actual knowledge of some facts constituting the violation at the time Rockwell submitted false claims to the government. Concerning Instruction No. 8, neither Stone nor his attorneys know the current address, telephone number, or employer of the individuals listed in Plaintiff's Consolidated Answers and Responses to Discovery.

Stone does not know the identities of specific persons who may have either affirmatively misrepresented to the government that Rockwell was in compliance with the Environmental and Safety Laws and Agreements which it had in fact violated, or concealed such violations from the government. Also, Stone does not know the identities of specific documents which contain affirmative misrepresentations or, when taken as a whole with other submissions by Rockwell, reflect concealment of these

violations. However, under the terms of the contracts between Rockwell and the U.S. Government relative to the operation of RFP (and Modifications thereto) previously identified in the "Nexus" column of Attachments 1-4 to Plaintiff's Consolidated Answers and Responses to Discovery, Rockwell was required to comply with all laws and regulations of the United States, which include laws, statutes and regulations governing the environment, health and safety. Furthermore, Modification 111 to the base contract, previously identified in the "Nexus" column of Attachments 1-4 to Plaintiff's Consolidated Answers and Responses to Discovery, requires that Rockwell affirmatively certify such compliance. Accordingly, all conduct by Rockwell in seeking to receive funds from the government in payment of fixed fees, base fees and award fees, as well as GAO payments, under the respective agreements relative to the operation of RFP, when Rockwell knew that it was in violation of applicable environmental, safety and health laws, constitutes knowing misrepresentation and concealment of the actual facts from the government.

Interrogatory No. 5:

With respect to your allegations, set forth in paragraphs 15 and 20 of the Complaint, that Rockwell conspired with others to (a) defraud the Government in order to obtain approval of a false or fraudulent claim, and (b) conceal the true nature and extent of its

* * *

[seal omitted] **U.S. Department of Justice**

United States Attorney
District of Colorado

Byron G. Rogers Federal Building (303) 844-2081
Twelfth Floor, Drawer 3615
1961 Stout Street FAX 844-2308
Denver, Colorado 80294

SUPPLEMENT TO
STATEMENT OF
MICHAEL J. NORTON
UNITED STATES ATTORNEY
DISTRICT OF COLORADO
NOVEMBER 18, 1992

The facts about the prosecution of Rockwell International corporation for criminal violations of this Nation's principal hazardous waste and water pollution laws while operating the Rocky Flats Nuclear Weapons Plant are as follows:

1. THE JUSTICE DEPARTMENT PROSECUTED ALL SERIOUS CRIMES FOUND AT ROCKY FLATS AND ACHIEVED A RECORD RESULT.

As to the facts of the prosecution, on March 26, 1992, following a lengthy criminal investigation by the FBI and the EPA, Rockwell pleaded guilty to ten environmental criminal violations which called for record criminal fines of $18.5 million.

These criminal fines, payable to the United States and to Colorado, led Colorado's Governor Roy Romer to say, "I believe the amount of the fine, one of the largest of its kind in the history of this state and of this nation, is appropriate given the nature of the violations."

A ten count information charged 330 separate instances of knowing felonious conduct and 80 separate instances of

criminal misdemeanor negligence during 1987 to 1989. These charges represented the most serious environmental crimes developed by our investigation for which a sufficient legal basis and credible evidence existed which we believed could result in and sustain a successful prosecution and conviction.

On June 1, the Chief Judge, after concluding that the plea agreement and fine "is just and fair and is in the public interest," imposed the largest hazardous waste criminal fine ever in U.S. history.

As Colorado's United States Attorney, I share with all Coloradans a deep and abiding commitment to the environment and to our mountains, our water, our air, and our other precious natural resources.

My office and I have been national leaders in prosecuting environmental crimes, achieving, for example, the first-ever criminal conviction in the Nation under the "knowing endangerment" provisions of RCRA.

That is why, even though Rocky Flats has been politically and publicly controversial and the most analyzed facility in Colorado's history, we were ready, willing, and able to take on the incredible challenge of this complex criminal investigation.

The early information we learned caused me to believe that serious environmental crimes may have occurred which presented possible significant threats to the environment and public health of citizens near Rocky Flats.

Having lost my oldest son to leukemia in 1983, I was more than ready to believe that these public health threats were real.

I believed this mandated significant action on our part and, in June 1989, a massive search warrant was executed to determine whether suspected environmental crimes had occurred.

During the 3½ year investigation, our investigative team analyzed more than three and one half million pages of documents and interviewed hundreds of witnesses.

From the beginning our investigative goal was to seek out and prosecute any serious environmental criminal conduct we found which was characterized by deception or which could have been avoided by alternate, available technology.

What we found was that, in consideration of national defense goals, an institutional "culture" shrouded in secrecy had prevailed over the years at Rocky Flats, which, until changed by the Secretary of Energy in 1989, resulted in nuclear weapons production receiving paramount priority, while environmental compliance was far down the list of concerns.

We found no evidence of any significant off-site physiological threat to the environment or to the public health not already known to the regulators and thus being addressed.

Unlike most criminal investigations, at no time during the course of this intense and complex investigation did any knowledgeable "insider" come forward to identify serious environmental criminal conduct or give useful inculpatory information which would corroborate the alleged crimes of others. This meant that any criminal case necessarily rested on stringing together thousands of documents to create inferences of criminality. Almost always, even in the most complex criminal investigation, someone eventually "cracks" and steps forward to provide an "insider's" cooperation. That simply did not happen here.

* * *

Boulder Daily Camera

Pat Schroeder calls Flats whistleblower 'a hero'

By Bill Scanlon
Camera Staff Writer

The man who says he blew the whistle that led to the FBI investigation of Rocky Flats was for six years the engineer who wrote reports no one wanted to see.

"I told them where the problems were," former Rocky Flats engineer Jim Stone told the Daily Camera. "I saw things people didn't want me to see."

U.S. Rep. Pat Schroeder on Friday night called Stone "a hero," who ought to be saluted for risking his career to tell the truth. Stone was fired in 1986 after six years at the plant. He was identified on a copyright KMGH-Channel 7 report Friday as the whistleblower who sparked the FBI probe two years ago.

Stone could not be contacted Saturday. In an earlier interview with the Daily Camera, he described the problems he observed at the plant.

"My job was to write weekly reports," said Stone. "I was in charge of engineering problems for the whole plant."

Stone described Building 771, the main plutonium recovery center, as being "held together with chewing gum and baling wire very seriously contaminated."

Among other things, plant and Department of Energy officials ignored his recommendation that a trench be dug to intercept contaminated soil before groundwater flushed it to Walnut Creek or Woman Creek, [illegible]id. Those two creeks dump into reservoirs that serve the people of Broomfield, Westminster, Thornton and Northglenn.

In the 1950s and 1960s, hazardous waste was simply buried on site, over time contaminating the soil, he said.

Former plant operator Dow Chemical Co. [illegible]d their mistakes," said Stone.

Groundwater running through the plant [illegible]ts the

contaminated soil and carries it
(See SCHROEDER, Page 7A)

(From Page 1A)

toward the creeks.

"I suggested putting in a corrugated-iron interceptor trench – 10 to 20 feet deep to the bed-rock – so it wouldn't get to the creeks," he said.

Stone also was ignored when he told top officials that Building 881 shouldn't be using an air conditioner to recycle contaminated air. He suggested a new type of air conditioning system that could do it safely, but the plan was rejected. "Their feeling is that once you design it, changing your mind is stupid. They'll do anything not to lose face. T[illegible]

Stone, early in his tenure at Rocky Flats, realized that the instruments that were supposed to measure the level of highly toxic beryllium were deliberately set in spots too far from the beryllium machines to detect anything.

"Year after year, they didn't catch anything," said Stone. "But I could see it on the machines, their clothes, their hair. I told them, 'you're monitoring areas that are not polluted.'"

Finally, Rockwell International accepted Stone's simple suggestion to wet the beryllium so when it is sanded, dust won't fly into the air.

Rockwell ran the plant, hiding problems from DOE, usually not including DOE officials at meetings, Stone maintained.

"At meetings, there was always the reprimand: 'Never allow a DOE engineer to have any idea we have a problem.'"

Stone says he suggested numerous new technologies to improve safety and production, but was rebuffed each time.

The groundwater monitoring system needs more wells – and in the right places – to detect radiation, he said.

"If we don't have the talent to do it right, we shouldn't be making the weapons," he said.

Stone said Building 771, the main processing building that was shut down for three months last winter, was

"extremely contaminated" when he worked there. He wrote a report, saying it needed more exits than it has, but was "reprimanded for not being a team player."

Dave Guffey, utilities manager for 771 until his retirement in 1983, said Saturday that Stone "was an excellent engineer who got a real shafting out there. He may have had some personal grudges, but he is a very sincere, very honest person."

Guffey described Rocky Flats as "one of the safest plants in the country from an industrial safety point of view. There is a lot of difference between industrial safety and radioactive safety."

Stone has moved out of state but last week flew back to Colorado.

He told Channel 7 that top Rocky Flats officials "absolutely" knew of hazardous and radioactive waste contamination problems. "They absolutely knew it. They absolutely lied about it and the bastards should be sent to jail."

He said he was convinced such orders came "from the top," but he refused to identify those individuals by name. "I can't say that; I'd rather shoot them dead," he said.

An FBI affidavit made public Friday said two former employees were the source of information leading to the investigation.

[FILED]
[U.S. DISTRICT COURT
[DISTRICT OF COLORADO]
['95 NOV 14 A8:43]
[JAMES R. MANSPEAKER CLERK]

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, Plaintiffs,	)	
v.	)	Case No. 89 C 1154
ROCKWELL INTERNATIONAL CORPORATION, Defendant.	)	

THE GOVERNMENT'S
MOTION FOR LEAVE TO INTERVENE

Pursuant to 31 U.S.C. § 3730(c)(3) and Rule 24(b) of the Federal Rules of Civil Procedure, the United States respectfully requests that the Court permit it to intervene in this qui tam action. As shown in the accompanying Memorandum In Support and Declaration of John A. Kolar, the United States has good cause for intervention at this time.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

HENRY L. SOLANO
United States Attorney

PAUL J. JOHNS
Assistant United States
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/s/ John A. Kolar
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Dated: November 13, 1995

[FILED]
[U.S. DISTRICT COURT
[DISTRICT OF COLORADO]
['95 NOV 14 A8:43]
[JAMES R. MANSPEAKER CLERK]

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, Plaintiffs,	)	
v.	)	Case No. 89 C 1154
ROCKWELL INTERNATIONAL CORPORATION, Defendant.	)	

DECLARATION OF JOHN A. KOLAR

I, John A. Kolar, do hereby declare and state as follows:

1. I am a trial attorney with the United States Department of Justice ("DOJ"), Civil Division, Commercial Litigation Branch. My duties including handling cases under the False Claims Act, 31 U.S.C. §§ 3729, et seq., including qui tam False Claims Act suits filed pursuant to 31 U.S.C. § 3730. I have personal knowledge of the facts contained in this Declaration, which is made in support of the United States' Motion to Intervene in this case.

2. The relator, James Stone, filed this qui tam action against Rockwell International Corporation ("Rockwell") on

or about July 4, 1989. The Complaint alleges that Rockwell, which managed the Department of Energy's ("DOE") Rocky Flats nuclear weapons plant in Golden, Colorado, concealed and misrepresented its poor environmental, safety and health ("ES&H") performance to DOE in an effort to preserve its contract and earn millions of dollars in payments and fees, including award fees, which it would not have been awarded, had DOE known the truth. Mr. Stone's case was assigned to me shortly after it was filed.

3. On March 26, 1992, simultaneously with the filing of Rockwell's criminal guilty plea to environmental violations, we filed a notice declining to intervene in this action.

4. In August 1991, Rockwell filed Rockwell v. United States, Case No. 91-1362 (Ct. Fed. Cl.), a breach of contract suit against the Department of Energy ("DOE") in the United States Court of Federal Claims. In this suit, which is currently pending, Rockwell seeks approximately $6.5 million in award fees for the operation of Rocky Flats during the period from October 1, 1988 through September 30, 1989. Rockwell contends that DOE headquarters officials improperly lowered Rockwell's award fee below what the Contracting Officer would have awarded, due to Rockwell's poor performance in the Environment, Safety, and Health (ES&H) area. Rockwell contends that it should have received the higher award fee recommended by the Contracting Officer, because a provision of the Rocky Flats contract supposedly placed the award fee determination within the sole discretion of the Contracting Officer.

5. Pursuant to our defense of DOE in Rockwell v. United States, we conducted approximately 20 depositions of former Rockwell employees during April 1994. In December 1994, Rockwell produced 16 boxes of documents in our response to our discovery requests. In January 1995, Rockwell made another 80 boxes of documents available for inspection and copying.

6. In the course of the foregoing discovery, we developed evidence showing that Rockwell concealed and

misrepresented various environmental criminal law violations from the DOE. This evidence relates inter alia to "pondcrete". Pondcrete was a mixture of sludge from the "solar ponds" on the Rocky Flats site and cement. The pondcrete was supposed to take the form of solid blocks. The pondcrete blocks were stored on two asphalt parking lots on the Rocky Flats plant site known as the "750 Pad" and the "904 Pad".

7. In the criminal case, Rockwell had pleaded guilty to the illegal storage of pondcrete in violation of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq. According to the Plea Agreement, a substantial number of pondcrete blocks were not in fact solid; rather, pondcrete was often a sludge-like or semi-liquid material. Also, according to the Plea Agreement, due to the insolid condition of the pondcrete, hazardous constituents leached out of the pondcrete and onto the 750 and 904 Pads.

8. As a result of discovery in Rockwell v. United States, we have developed evidence that Rockwell concealed the problems associated with pondcrete from DOE, and made misrepresentations to DOE with respect thereto. The evidence shows that Rockwell knew as early as May 1987 of the insolid condition of the pondcrete blocks, but Rockwell covered up and concealed this fact from DOE at least until May 1988. In May 1988, a box of pondcrete spilled on the 904 Pad, and the poor condition of the pondcrete became known to DOE. Subsequent to May 1988, however, Rockwell continued to falsely represent to DOE and others that it was ignorant about the insolid condition of the pondcrete prior to May 1988.

9. During the Fall of 1994, counsel for Mr. Stone contacted us and suggested that we should reconsider intervention in this suit. Mr. Stone's counsel took the position that the voluminous documents that had been produced during the course of document discovery had strengthened the relator's case, and warranted intervention by the government for good cause under 31 U.S.C.

§ 3730(c)(3). Mr. Stone's counsel organized those documents into submissions covering most of the major subject matter areas at issue along with narrative describing the significance of the evidence, and provided the submissions to us for our review.

10. As a result of the evidence obtained during discovery in the Rockwell Court of Federal Claims case and material submitted by Mr. Stone's counsel, we have concluded that we should intervene herein. We also plan to move for leave to amend the government's Answer in the Court of Federal Claims action to assert False Claims Act counterclaims parallel to the claims at issue herein, and a fraud defense pursuant to 28 U.S.C. § 2514. In addition, we are filing a motion to stay the Court of Federal Claims action, so that discovery can be completed and trial conducted in this suit.

11. If this Court permits us to intervene, we plan to add alternative common law legal theories to the complaint (common law fraud, unjust enrichment, payment by mistake, and breach of contract) which the relator does not have standing to bring on the government's behalf. However, these theories will be based upon the facts already in litigation. Thus, we do not anticipate that our intervention will alter the parameters of the facts under litigation in any significant respect. Moreover, we understand that depositions have only just commenced in this case. Based upon my discussions with relator's counsel, I intend to join in the deposition process currently underway, and I do not anticipate that our intervention will materially change or affect the pace of discovery.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 13th day of November 1995, at Washington, D.C.

/s/ John A. Kolar

John A. Kolar

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

UNITED STATES OF AMERICA, ex rel. JAMES S. STONE,	)	
Plaintiffs,	)	
v.	)	
	)	Case No. 89-C-1154
ROCKWELL INTERNATIONAL CORPORATION,	)	
Defendant.	)	

SUPPLEMENTAL DECLARATION OF JOHN A. KOLAR

I, John A. Kolar, do hereby declare and state as follows:

A. Introduction

1. I am a trial attorney with the United States Department of Justice ("DOJ"), Civil Division, Commercial Litigation Branch ("DOJ-Civil"). My duties including handling cases under the False Claims Act, 31 U.S.C. §§ 3729, et seq., including qui tam False Claims Act suits filed pursuant to 31 U.S.C. § 3730. I have personal knowledge of the facts contained in this Declaration, which is made in support of the United States' Motion to Intervene in this case.

2. The relator, James Stone, filed this qui tam action (referred to hereinbelow as "the qui tam action" or simply "Stone") against Rockwell International Corporation ("Rockwell") on or about July 4, 1989. It alleges that Rockwell concealed from the Department of Energy ("DOE") and misrepresented to DOE its performance with respect to environmental, safety and health ("ES&H") matters while it was operating the Rocky Flats nuclear

weapons plant for DOE. This case was assigned to me shortly after it was filed.

B. History of the Civil Division's Dealings with the Prosecutors and Rockwell Regarding the Instant Qui Tam Action

3. In July 1989, when this suit was filed, Rockwell's ES&H performance at Rocky Flats was the subject of a federal grand jury investigation. We had difficulty investigating the qui tam case due to the pendency of the grand jury investigation. Much pertinent information was unavailable to us because it was subject to grand jury secrecy under Rule 6(e) of the Fed. R. Crim. P. As recited in a memorandum we submitted to the Court on March 5, 1990 seeking an extension of the qui tam investigative and seal period, and the Affidavit of Peter J. Murtha, one of the criminal prosecutors leading that investigation, in support thereof (Ex. D(4) to Rockwell's Opposition) by March 1990: (a) the criminal investigation had gathered approximately 1,000,000 million pages of documents; (b) the Civil Division had for many months been attempting to obtain access to documents in possession of the Rocky Flats criminal investigation, but was unable to; (c) many of the documents were subject to grand jury secrecy and were unavailable to the Civil Division; and (d) the criminal prosecutors did "not favor the release of the grand jury material to the Civil Division pursuant to court order under the provisions of Fed. R. Crim. P. 6(e)(3)(C)(i) at this time because it would burden our investigation substantially and could potentially undermine the secrecy of the grand jury during this critical pre-indictment period." (See Affidavit of Peter J. Murtha, ¶ 7, Ex. D(4) to Rockwell Opposition.)

4. Following the filing of this pleading, the prosecutors did permit us to review a very limited subset of the information they had gathered. This consisted of documentary evidence in the possession of the criminal investigation, other than documents subpoenaed by the grand jury. Contrary to the assertions in Rockwell's

response, prior to finally declining Stone in March 1992, we were never permitted access to documents that had been subpoenaed by the grand jury (even though such documents arguably constituted non-6(e) material under Tenth Circuit case law), nor did the prosecutors agree to permit us to file a motion for such access pursuant to Rule 6(e) (as discussed above). Moreover, the prosecutors even declined to share with us memoranda of interview prepared by the FBI and Environmental Protection Agency ("EPA") investigators assigned to the grand jury task force for fear that this might raise an argument by Rockwell that grand jury secrecy had been violated. The prosecutors were justifiably careful to preserve the integrity of the grand jury investigation. This position was consistent with DOJ's general practice of having the civil side defer to the criminal investigation, particularly where a grand jury investigation is underway.

5. During the Fall of 1990, I spent a couple of days in Denver reviewing and selecting for copying non-grand jury subpoenaed documents that had been made available by the prosecutors and that I believed might be relevant. We proceeded to review those documents. However, to be frank, we were not able to learn very much from those documents, inasmuch as we lacked a thorough understanding of the operations of the Rocky Flats Plant and other necessary contextual information at that point in time. After some initial efforts to investigate, we concluded at some point during the Fall of 1990 that the best course of action was to await the outcome of the grand jury investigation, rather than trying to "re-invent the wheel" by conducting our own full-tilt parallel investigation. We reached that conclusion for several reasons: (a) the grand jury investigation was massive and was requiring a great quantity of investigative resources; (b) utilizing Civil Division resources to duplicate the grand jury investigation would not have been cost-beneficial; and (c) the prosecutors expressed concerns to us that any duplicative investigation by DOJ-Civil might interfere with their ongoing efforts.

6. We hoped that this Court would grant us extensions of the qui tam investigative period commensurate with the duration of the grand jury investigation, but that turned out not to be the case. During the Fall of 1990, I appeared before the Honorable Jim R. Carrigan, District Judge, who was then presiding over the qui tam case, and was advised by Judge Carrigan that he would not grant further extensions beyond October. Judge Carrigan ultimately entered an order requiring that DOJ-Civil file its election whether to intervene in or decline this qui tam suit in November 1990. On or about November 8, 1990, we filed a Notice informing the Court that "[d]ue to the time and investigative constraints placed upon the Civil Division of the Department of Justice, the United States respectfully notifies the Court that it is unable at this time to make an election to intervene or not to do so in [this qui tam action]." (See Exhibit D(9) to Rockwell's Opposition.) Although we intended to proceed with the investigation in due course, for the reasons of prosecutive efficiency described in paragraph 5, as of the Fall of 1991, our investigation had not progressed significantly further. Again, it appeared to us to be more efficient to await the conclusion of the grand jury process before undertaking substantial new investigative efforts of our own.

7. During the Fall of 1991, Mr. Murtha and Kenneth R. Fimberg, the lead prosecutor for the United States Attorney's Office in Denver in the grand jury investigation, informed us that they were negotiating a plea agreement with Rockwell. They told us that one of the sticking points was Rockwell's desire for a "global release" from liability by the government that would include civil False Claims Act liability, including for the conduct alleged in Stone. Messrs. Fimberg and Murtha queried us as to our position regarding a civil release. We advised them we would confer and get back to them.

8. To aid us in our deliberations as to whether to civilly release Rockwell, we asked the prosecutors at

various times during the Fall of 1991 whether the non-grand jury evidence in their possession indicated that Rockwell had submitted false statements or claims to DOE. They told us that they could not share their investigative information with us for fear of violating Rule 6(e).

9. In approximately mid-October 1991, we advised the prosecutors that we were insufficiently knowledgeable about the facts and evidence to grant Rockwell a civil release. We had limited information and simply could not form a judgment as to whether Rockwell had violated the False Claims Act.

10. We understood from the prosecutors that they conveyed our position to Rockwell, and the evidence submitted by Rockwell with its response so indicates. For example, the October 18, 1981 letter from Rockwell's criminal defense counsel, Lee D. Foreman, acknowledges that "DOJ-Civil does not consider a meeting [with Rockwell] to be useful . . . ." (See Ex. B(9) to Rockwell's Opposition.)

11. In that letter, Mr. Foreman proposed the following language for insertion into the plea agreement:

> In connection with this disposition, the United States agrees that, as to all matters which relate to the subject matter of this Grand Jury investigation which are presently known to the Department of Justice or the Environmental Protection Agency, the United States covenants not to sue or take administrative action against Rockwell for civil damages, penalties, or, other monetary relief under . . . the False Claims Act, 31 U.S.C. §§ 3729 et seq.

(Ex. B(9).) As we understood it, by proposing this language, Rockwell hoped to preclude us in DOJ-Civil from pursuing civil False Claims Act claims based on any information in the hands of the prosecutors even if that information was not known to us. We rejected this language because pertinent information was then unknown to us, and we

believed it would have been irresponsible for us to release claims without full knowledge of the facts regarding Rockwell's conduct. We communicated our position both to the prosecutors and directly to Rockwell.

12. On or about October 31, 1991, my Deputy Director, Joyce R. Branda, had a telephone conversation with Gary Black, an Assistant Corporate Counsel with Rockwell involved in handling the Rocky Flats matter for Rockwell. Ms. Branda told Mr. Black that the language described in the preceding paragraph "was not on the table" because DOJ-Civil "could not release the unknown." Ms. Branda further advised Mr. Black that, while it was unlikely DOJ-Civil would elect to intervene in Stone, we could not give Rockwell any assurances that we would never do so.

13. Contrary to the contention by Rockwell that DOJ-Civil was fully informed about the investigation during the Fall of 1991, I note that Rockwell sought an agreement from the prosecutors, who refused to agree, that would have blocked DOJ-Civil's future access to Rule 6(e) materials. Provisions with that effect were included in Rockwell's October 15, 1991 letter to Michael Norton (Ex. B(8) to Rockwell's Opposition), and the draft plea agreement attached thereto.

14. Despite Ms. Branda's conversation with Mr. Black on October 31, 1991, Rockwell persisted in its efforts to obtain a civil release. We agreed to meet with Rockwell's counsel on November 5, 1991.

15. That meeting was held on November 5, 1991. DOJ-Civil was represented by Deputy Assistant Attorney General Stuart E. Schiffer, the Director of the Civil Fraud Section (my section) Michael F. Hertz, the Deputy Director, Joyce R. Branda, and the undersigned. United States Attorney Michael Norton, Ken Fimberg, and Peter Murtha were also in attendance. Rockwell's representatives included John Aldock, Lee Foreman, Bryan Morgan, and Gary Black, all counsel for Rockwell. During that meeting, Rockwell provided to us proposed language for the plea

agreement that would effectively have given it a civil release from liability from False Claims Act claims for environmental matters at Rocky Flats. (See Exhibit A hereto.)

16. We (DOJ-Civil) rejected that language and reiterated our position to Rockwell that we were insufficiently knowledgeable about the facts and evidence to give Rockwell a release from civil False Claims Act liability. In fact, we told Rockwell that we were insufficiently informed even to attempt to negotiate a settlement with them. We advised Rockwell that we had had access to only a limited quantity of non-grand jury subpoenaed documents, and, therefore, could not make an informed judgment on the merits. We certainly did not tell Rockwell's counsel that, "we felt well informed concerning the information developed during the criminal case," as asserted by Mr. Foreman in his affidavit. Indeed, I have a specific recollection that it was in response to our statement that we lacked access to grand jury information that Rockwell agreed to submit to us, by letter dated November 11, 1991 (Ex. C(1) to Rockwell's Opposition), documents that Rockwell asserted "provide[d] the factual basis for the subject areas covered by the criminal counts." In other words, Rockwell undertook to apprise us of the nature and scope of the prosecutors' evidence, because, as Rockwell recognized, the prosecutors could not share the fruits of their investigation with us.

17. Notwithstanding our refusal to grant Rockwell a release or to enter into settlement discussions with them, Rockwell wanted some degree of "comfort" that DOJ-Civil was not then harboring a present intention to proceed against them in the qui tam suit. As a middle ground between our position that we could not release Rockwell and Rockwell's desire for a release, it was agreed that we would re-examine the evidence in our files, together with any evidence Rockwell wished to provide to us, and formalize the position we had earlier taken (in filing our Notice with the Court on November 8, 1990) that we were not

proceeding with Stone at the time. From our perspective, this merely continued the status quo ante because, as a matter of fact, we were not in the Stone litigation at that point in time and we had no intention of joining the litigation at that point in time.

18. However, during the November 5 meeting, we advised Rockwell that, assuming we did file another Notice which formalized our non-intervention, we were not binding ourselves forever to not intervene in Stone. We called to Rockwell's attention 31 U.S.C. § 3730(c)(3), which permits the government to intervene later for "good cause" even after it has initially declined a qui tam suit. We told Rockwell that we had no intention of relinquishing our right to intervene later in Stone, if "good cause" should arise under 31 U.S.C. § 3730(c)(3). Rockwell advised us that they would submit to us what they felt was the most "inculpatory" evidence in the possession of the prosecutors, so that we would be fully informed about the prosecutors' case and Rockwell could attempt to challenge any future effort at intervention by us to the extent it was based upon the same evidence on the grounds that it did not meet the statutory standard. We have subsequently learned that the evidence Rockwell turned over to us was inculpatory with regard to Rockwell's commission of ES&H crimes, but that it either did not address at all or was exculpatory on the issue of whether Rockwell concealed those crimes from DOE, other otherwise misrepresented their conduct to DOE.

19. Rockwell clearly understood that they were not receiving a civil release or settlement. Attached to the Affidavit of Lee D. Foreman in support of Rockwell's Opposition is a November 8, 1991 letter that Mr. Foreman sent to AUSA Ken Fimberg (Ex. B(10)). Mr. Foreman sent this letter subsequent to meeting with us on November 5. Mr. Foreman stated in his letter that it was

> the clear position taken in Washington by DOJ-Civil . . . that they were not settling with us . . .

(emphasis added)

20. By letter dated November 11, 1991 (Ex. C(1) to Rockwell's Opposition), Rockwell submitted the "inculpatory" evidence for our review. We reviewed that evidence, along with the limited evidence we had previously gathered, and recommended that a Notice formally declining Stone be filed.

21. Authority to file that Notice was granted in November 1991, but we were asked to wait to file our Notice with the Court until the criminal plea was actually entered. Accordingly, we waited until March 26, 1992 to file. We did not conduct any further investigation in the interim.

22. On March 26, 1992, we sent Rockwell a letter, a copy of which is attached hereto as Exhibit B, informing Rockwell of our decision. The letter describes in broad terms the non-grand jury evidence we had reviewed in reaching our decision. We stated in the letter that this evidence had included "non grand-jury [sic] evidence acquired during the criminal investigation." This was a reference to the documents that I had copied from the prosecutors' files of non-grand jury subpoenaed documents during the Fall of 1990 and, for the most part, those documents related to the award fee process, as indicated by the second paragraph of the letter.

23. Notably, our March 26, 1992 letter to Rockwell expressly informed Rockwell that we were preserving our right to intervene later in Stone under the statutory standard of "good cause". The last paragraph stated:

> Based upon our review of this evidence, we have filed a Notice Declining To Intervene In This Action. As indicated in that Notice, and as provided by 31 U.S.C. § 3730(c)(3), the United States reserves the right to intervene in the action upon a showing of "good cause".

24. On March 26, 1992, simultaneously with the filing of Rockwell's criminal plea, we filed a notice declining Stone.

Our notice declining intervention expressly stated: "The United States also reserves its rights under 31 U.S.C. § 3730(c)(3) to intervene at a later date upon a showing of good cause." (Ex. B(15) to Rockwell's Opposition.) At no time did we (or any other government officials, to our knowledge) suggest to Rockwell that the "good cause" standard that would apply in this case would be or should be any different than the standard established in the statute.

24a. At the time the prosecutors filed the Plea Agreement, we understand that they also filed a Sentencing Memorandum. Consistent with their position that they could not disclose evidence from the criminal investigation to us, the prosecutors did not provide drafts of the Sentencing Memorandum in advance of the filing of the plea, and we did not see the Sentencing Memorandum or drafts thereof prior to December 1992 (see below).

25. The final Plea Agreement (Ex. B(14) to Rockwell's Opposition) is clear that there were no "side bar" promises regarding the "good cause" standard. The release language therein stated:

> This covenant does not encompass (or preclude) . . . the issues raised in United States ex rel., and James S. Stone v. Rockwell International Corporation, Civil Action No. 89-C-1154 (D. Colo.). (¶ 5.)

It stated no more than that:

> After an independent review, the Department of Justice--Civil Division has determined to file a notice in Stone declining to intervene. (¶ 5.)

The Plea Agreement further stated:

> This document states the parties' entire agreement. There are no other agreements, terms or conditions, express or implied. In entering into this agreement, neither the Department of Justice nor Rockwell have relied, or are relying, on any terms, promises or

conditions not expressly stated herein. (¶ 12.)

26. In light of our clear course of dealing with Rockwell with respect to the question of civil liability and later intervention for "good cause" in Stone, described above, and the statement in the Plea Agreement that there were no "side bar" promises, it would have been manifestly unreasonable for Rockwell to believe that the criminal prosecutors were placing any kind of "gloss" on the "good cause" standard, as Rockwell appears to suggest in its response.

27. To the extent that Rockwell believes it paid a larger criminal fine after we agreed to file a Notice of Declination in Stone than it would have paid in the absence of that Notice (and we were not privy to the alleged discussions between Mr. Fimberg and Rockwell's counsel in this regard), Rockwell got what it asked for. We did in fact file the Notice on March 26, 1992. At that time, we in DOJ-Civil were not harboring any intention to later intervene in Stone, but, as Rockwell well knew (because we told them during the November 5, 1991 meeting, in our letter of March 26, 1992, and in our Notice of Declination), we had expressly reserved our right to do so, if "good cause" were later to arise.

28. Thus, the sole issue before the Court is whether DOJ-Civil can demonstrate "good cause" for intervention now under the standard set forth in 31 U.S.C. § 3730(c)(3).

C. The Principal Reasons for our Declination.

29. We declined this case because, at the time we were making our decision, that is, during the Fall of 1991, we were unable to ascertain that Mr. Stone had a viable False Claims Act case. Our principal concerns were as follows. First, the complaint filed by Mr. Stone was broad and all-encompassing and contained little or no specification of the statements that he believed were false or fraudulent. While we obviously were aware that Rockwell intended to plead guilty to ES&H violations, nowhere in the Plea Agreement

drafts that were provided to us in the Fall of 1991 was there any indication that Rockwell had made misrepresentations to DOE, or concealed its conduct from DOE, or otherwise committed fraud or submitted false statements to DOE in regard to ES&H performance. (A second document denominated "Plea Agreement and Statement of Factual Basis" was filed at the time of the entry of the plea, but this document was not shared by the prosecutors with us prior to our declination.)

30. Moreover, the material provided to us by Rockwell in November 1991 was designed to further inform us about the "factual basis for the subject areas covered by the criminal counts." Rockwell's submission did not address whether Rockwell had made false statements or had concealed material information from DOE. Indeed, Rockwell's description of the material it was submitting to us with regard to pondcrete (which was not then, but which later became, the primary focus of our concern) stated:

> Documents and witness statements [prepared by Rockwell] relating to pondcrete matter are collected in Tab D. The essential facts alleged by the prosecution are that pondcrete was poorly manufactured, deteriorated in outdoor storage causing leachate to run off the storage pads, and was stored without the necessary RCRA permits.

(See Ex. C(1) to Rockwell's Opposition, p. 2) We concluded that "such essential facts" would not in and of themselves support liability under the False Claims Act.

31. We were aware that Rockwell had represented to DOE in its so-called "Self-Analyses" submitted during the award fee process that it was complying with the ES&H laws. We thought it possible that such statements might have constituted misrepresentations in light of the fact that Rockwell was pleading guilty to violations of those laws. However, we did not see any nexus between specific aspects of Rockwell's violations and those statements. Additionally, we had a question about whether DOE relied upon those

statements in deciding Rockwell's award fees.

32. For these principal reasons, we reached our decision to decline in November 1991, and, as already noted, filed our Notice on March 26, 1992.

D. The Development of Additional Evidence after March 1992 and Its Significance.

33. In approximately December 1992, Mr. Stone's counsel sent a copy of the Plaintiff's Sentencing Memorandum to my former colleague, Allen Bruns. Mr. Bruns, then an attorney in DOJ-Civil's Court of Federal Claims Section (Mr. Bruns passed away later in December 1992), was handling the government's defense of Rockwell's suit for award fees, Rockwell v. United States, in the Court of Federal Claims. Rockwell alleges in that suit that DOE officials at headquarters in Washington, D.C. breached the Rocky Flats contract by lowering Rockwell's award fees after the FBI raid in June 1989, because the contract required that the award fee be the determination of the contracting officer, the Manager of DOE's Albuquerque, New Mexico operations office.

34. After Mr. Brun's death, Rockwell v. United States was assigned to me.

35. In December 1992, I reviewed the Plaintiff's Sentencing Memorandum. To my knowledge, this was the first time anyone in DOJ-Civil had seen the Sentencing Memorandum or was aware of the allegations contained therein.

36. The allegations in the Plaintiff's Sentencing Memorandum went far beyond the conduct to which Rockwell had pleaded guilty in its March 1992 plea. The Sentencing Memorandum argued that Rockwell had engaged in a pattern and course of conduct of concealing and misrepresenting information about its performance with respect to "pondcrete", and other environmental compliance issues, from DOE. Upon reading the Sentencing Memorandum in December 1992, I realized that there might

be merit to the allegations in Stone after all. I also recognized that any fraud or false statements in connection with pondcrete (or other ES&H matters) might provide the government a defense to Rockwell's action for award fees. See, e.g., 28 U.S.C. § 2514 (the Special Plea in Fraud).

37. Accordingly, at that time, I determined to embark upon additional investigation to determine whether in fact the allegations made by the prosecutors in the Sentencing Memorandum had merit. In approximately January 1993, I advised Richard J. Ney, Rockwell's counsel in Rockwell v. United States, of my intention in this regard, and told Mr. Ney that such information might provide the government with defenses to Rockwell's suit. I also advised Mr. Ney that, if the allegations in the Sentencing Memorandum were borne out, I might consider recommending intervention in Stone for good cause.

38. In March 1993, I served discovery upon Rockwell in Rockwell v. United States that was intended to elicit information regarding any misrepresentations and concealments in regard to pondcrete and a couple of other areas. I decided to focus most of my efforts upon pondcrete because it seemed from my reading of the Sentencing Memorandum that it was the most manageable single area.

39. Over the course of the next three years, we gathered evidence that we believe furnishes good cause under 31 U.S.C. § 3730(c)(3) for intervention. Our efforts to gather that evidence included the discovery requests we served on Rockwell in March 1993 in Rockwell v. United States, and depositions we conducted of former Rockwell employees in April 1994 in that lawsuit. We also obtained non-6(e) criminal investigative memoranda which the criminal prosecutors had declined to share with us prior to our declination decision. Rockwell resisted our document requests, and it was not until December 1994 and January 1995 that Rockwell produced responsive documents in compliance with an order of the Court of Federal Claims.

40. I also note that, prior to taking depositions in April

1994, we sought an order under Rule 6(e) from this Court (by Finesilver, former C.J.) allowing us access to grand jury subpoenaed documents in the hands of the criminal prosecutors. Rockwell successfully opposed our motion on the ground that we had not exhausted all avenues for obtaining those documents in the Court of Federal Claims suit (even though our requests for the documents had been pending since March 1993).

41. Thus, at every stage, Rockwell has resisted our efforts to discover the facts about its concealment and misrepresentations with respect to its ES&H performance, and it has therefore required three years for us to reach the stage where we believed we had sufficient information to assert False Claims Act claims against Rockwell through intervention in Stone.

42. I will attempt to describe some of the evidence which we obtained post-March 1992 showing that Rockwell engaged in a course of conduct to conceal and misrepresent its performance with respect to pondcrete from DOE and thereby obtain increased award fees. All of the evidence and documents I describe below we obtained for the first time subsequent to March 1992 (and, indeed, subsequent to June 1992, when the criminal court accepted Rockwell's guilty plea).

43. In his EPA interview (Ex. C(19 to Rockwell's Opposition), Howard Long, a Rockwell pondcrete operator, made the following highly inculpatory admissions regarding Rockwell's knowledge of the insolidity of pondcrete prior to May 23, 1988 (Rockwell has alleged that May 23, 1988 was the first time it became aware that any significant number of pondcrete blocks in storage on the 750 and 904 Pads on the Rocky Flats Plant site was "mushy", rather than solid, as DOE believed it to be). Mr. Long stated (this and the other summaries below are not in every case verbatim quotations from the interview memoranda; in some instances, I have edited the information in those memos or otherwise condensed it, while attempting not to alter its

substance):

> All Rockwell employees realized that there was a problem with the mixing of Pondcrete as many of the blocks were not setting correctly.
>
> In 1987, there was a push for massive production of Pondcrete because there was a deadline for closure of the 207A Pad imposed upon Rocky Flats by the Colorado Department of Health. During that time period, production of Pondcrete was up to about 120 boxes a day, but the rejection rate was high. After the first few rejections by the Union inspectors, Ron Teel instructed the employees to 'doctor up' the bad blocks. This was accomplished by sprinkling cement onto the top of the bad blocks. This caused the first few inches of the bad blocks to harden, so that the inspectors would believe that the whole block had set satisfactorily. These boxes were also sent to the 750 Pad for storage.
>
> Long had complained to Teel approximately 100 times during the year about the deteriorating boxes of Pondcrete both during production at Building 788 and while they were sitting on the 750 Pad. Long was also present when Dean Pierson, Dick Garrett, Ralph Sprague and Pat McNeil complained to Teel on numerous occasions about the deterioration of the Pondcrete containers.
>
> In August and September of 1987, the Pondcrete crew observed that many boxes of Pondcrete on the 750 Pad were leaking badly. They reported this to Dan Tallman, the Pondcrete Operation foreman. Tallman instructed them to shut down the operation, and leave the boxes alone.
>
> In December 1987, Long, Pierson, and Swenson complained to William Weston, Rockwell's

> Director of Plutonium Operations, about the leaking pondcrete. Nothing happened as a result of that meeting.

44. Mr. Long's information is also significant because it confirms that the pondcrete insolidity problem was the direct result of Rockwell's effort to increase pondcrete production levels. We contend that Rockwell made that decision to create a misleading impression to DOE that it was meeting the RCRA compliance schedules when, in fact, all Rockwell was doing was removing hazardous sludge and converting it into pondcrete blocks that Rockwell knew would later have to be remediated. We contend that DOE would not have paid Rockwell as much as it did in award fees if DOE had known that Rockwell was knowingly engaging in what amounted to a "shell game" with the sludge, which merely gave a superficial impression that it was complying with the RCRA compliance agreement.

45. In her EPA interview (Ex. C(23)), another pondcrete operator, Patricia McNeil, stated:

> The pondcrete was supposed to be a solid concrete block that was solid from top to bottom. It was okay for the pondcrete to leave Building 788 (where it was mixed) with a putty like consistency but the pondcrete would set up and become a solid block after it was put in storage (on the Pads).
>
> However, when McNeil went out to the 750 Pad, she and the other workers would walk on top of the pondcrete blocks to put the tarps on them. From walking on the blocks you could feel that some of them were soft. It was common knowledge that some of the pondcrete blocks were soft at the 750 Pad. McNeil believes that part of the problem was when Rockwell "jacked up" production to 200 boxes per week it cut into the quality of the pondcrete.

46. Ms. McNeil's statement is significant because it

belies Rockwell's continued assertions to us (as recently as September 1995) that there was no requirement that the pondcrete blocks be solid monoliths; rather, Rockwell has consistently argued to us that it was sufficient that the blocks be of a putty-like consistency both before they left the processing building and while they were stored on the Pads. Additionally, Ms. McNeil's statement further corroborates Mr. Long's statement that the degradation in pondcrete quality was due to Rockwell's decision to speed up production.

47. Pondcrete operator Richard Garrett (Ex. C(28)), told the EPA that:

> Sometime in the winter of 1987/88 a box of pondcrete was dropped off a truck by Leif Swensen. Garrett was present. The material spilled onto the 904 Pad and was cleaned up by Garrett and Swensen. Garrett said he informed [his supervisor] Ron Teel of this incident, which Garrett believed predated the May 23, 1988 spill.
>
> It was obvious to Garrett from his trips to the 904 Pad that there was a problem with the pondcrete. He said the problem was obvious for many months before the May 23, 1988 spill.

48. Both Long and Garrett stated that they complained to their supervisor, Ron Teel, about the pondcrete problems described in their interviews. Long indicated that he complained to Teel "approximately 100 times" during 1987. McNeil stated that the insolidity of pondcrete was common knowledge among Rockwell employees. Yet, Rockwell has continuously denied that this information from its pondcrete operators flowed up the company's chain of command.

49. In a request for admission ("RFA") which we served upon Rockwell in March 1993 in Rockwell v. United States, we asked Rockwell to admit:

> . . . by the Spring of 1987, several Rockwell employees involved in making pondcrete told their

> foreman [i.e., Ron Teel] that a significant portion of the pondcrete blocks were not solidifying and were unstable.

Rockwell responded to this RFA as follows:

> Rockwell denies this RFA. The deposition testimony of the foreman responsible for pondcrete production during the Spring of 1987 [Ron Teel] indicates that pondcrete workers did not report to him that significant numbers of pondcrete blocks did not solidify . . . .

50. Another indication that the information flowed up Rockwell's chain of command was the EPA interview of Richard Roundtree, Ex. C(29) to Rockwell's response. Roundtree was one of the pondcrete inspectors. Roundtree stated:

> He knew there was a problem with pondcrete not setting up [hardening]. He and the other inspectors knew this and the information was passed along to their supervisor, who Roundtree believed passed the information to the next level of supervision.

51. One of the issues in this case is whether or not DOE officials relied upon the concealment of ES&H information by Rockwell. Our new evidence includes evidence that DOE did so rely. The following memoranda of interview of DOE officials indicate reliance by DOE officials.

52. The EPA interviewed Candice Jieree, Chief of the DOE Safety and Environment Branch at Rocky Flats (see copy of interview appended hereto as Exhibit C). Ms. Jieree stated:

> In the fall of 1987, we went on an inspection tour of the 904 pad, 750 pad, and Building 788 with Ed Naimon and Garvin Hewitt of Rockwell. Naimon and Hewitt did not inform her of any problems with making the pondcrete.
>
> It was not until the May 23, 1988 spill of pondcrete

> that Jieree became aware of the problem with contamination of the surface water with run-off from the 904 and 750 pads. The contamination of the run-off area around the pondcrete pads was the biggest potential environmental problem at the Rocky Flats Plant.
>
> She was not aware until interviewed by EPA [August 1, 1990] that, going back as far as October 1986, Rockwell had results indicating elevated contaminants in the run-off water from the pads.

53. The EPA interviewed Tod Anderson. Anderson was a DOE official at the Rocky Flats Plant. In August 1987, Jieree asked him to undertake an inspection of the 750 Pad. He did so, and found that the cardboard boxes holding the pondcrete was deteriorating. Anderson had Rockwell personnel open two of the boxes. The pondcrete inside appeared to be solid, as Anderson understood it was supposed to be. Anderson noticed some leaning boxes, but believed the leaning was due to the void space in the tops of the boxes between the upper surface of the pondcrete blocks and the cardboard itself. At this time, there was no question in Anderson's mind that the pondcrete was solid. (See copy of interview attached hereto as Exhibit D.)

54. The EPA interviewed Frank Bingham, who in 1987-88 was the Chief of the Environmental Compliance Branch, DOE, at the Nevada Test Site ("NTS") (Ex. C(24) to Rockwell's Opposition). The pondcrete blocks were intended for ultimate burial at the NTS. Mr. Bingham told the EPA investigators that

> He toured the Rocky Flats Plant including the manufacturing building for pondcrete prior to the May 23, 1988 spill. He was assured and came away with the impression that NTS was receiving a solid concrete block. The first time he learned there was a problem with solidification was upon notification, after the May 23, 1988 spill by Rockwell and DOE's Rocky Flats Office.

> Bingham was upset because NTS had told the State of Nevada that the materials being buried at NTS were free of liquids. Based on these representations, NTS was allowed to bury these materials without having a leachate collection system of liner.

55. Bruce Fitzsimmons was another DOE official at NTS. Mr. Fitzsimmons told the EPA investigators that Bruce Church, the head of NTS, was very upset upon finding that the pondcrete was not solid.

56. Whether DOE knew about the pondcrete problems prior to the May 23, 1988 spill is an important factual issue in this qui tam litigation. Rockwell has asserted throughout its litigation against Mr. Stone, and in its litigation against the government in the Court of Federal Claims that DOE officials were well aware of the pondcrete solidification problems prior to May 1988.

57. Ironically, at page 16 of its Opposition, Rockwell argues that evidence of DOE's ignorance was available to us prior to our filing of the declination notice in March 1992, and therefore cannot be "new" evidence that justifies intervention for good cause. The fact is that the interviews of DOE employees cited above were not made available to DOJ-Civil prior to declination. DOJ-Civil obtained those interviews subsequent to declination, and then confirmed that DOE was unaware of the problems by the absence of any substantial information suggesting DOE knowledge in the more than 100 boxes of documents we reviewed in December 1994 and January 1995. Yet, as recently as September 1995, Rockwell continued to maintain that intervention herein was not justified on the merits, **precisely because DOE knew about the problems.** Rockwell cannot have it both ways. Rockwell cannot argue to us that intervention is inappropriate on the merits because DOE knew of the problems, and still argue to this Court that our evidence of DOE's ignorance is "old", rather than "new", evidence.

58. Another issue on which we lacked evidence when we declined the case in March 1992 was whether or not Rockwell's plant management knew about the pondcrete problems. Rockwell management knowledge is an especially significant issue in this case due to Rockwell's contention that its contract with DOE immunizes it from liability unless its then Plant Manager, Dominic Sanchini (who is deceased), personally acted with "wilful misconduct or lack of good faith" in regard to pondcrete. While we disagree with Rockwell's position regarding the contract, this is obviously an issue with which we must deal. As already indicated, Rockwell has steadfastly denied that information about insolid pondcrete flowed up its command chain.

59. At the time we declined, Rockwell had submitted to us a one-page handwritten note from an individual identified only as "Wayne" which alluded to a meeting involving Mr. Sanchini on or about September 9, 1987 (Ex. C(4) to Rockwell's response) indicating that "Dom" was "looking for ideas" "to really make a solid block" such as "mix[ing] more concrete" into the blocks. Rockwell did not submit to us any clarifying information regarding this isolated one-page note, or identify "Wayne" or inform us of his high rank within Rockwell's management chain.

60. We first ascertained the identity of "Wayne" during our deposition of former Rockwell employee Frank Blaha on April 20, 1994 (thus, more than two years subsequent to our declination). Mr. Blaha identified "Wayne" as Wayne Meyers and described him as Rockwell's Director of Health, Safety and Environment.

61. The day following the Blaha deposition, April 21, 1994, I, along with DOE Special Agent Kathryn R. Kemper, interviewed Mr. Meyers. We took a sworn statement from Mr. Myers authenticating the handwritten note mentioning "Dom" and confirming that "Dom" was in fact Mr. Sanchini, Rockwell's Plant Manager. (See Exhibit E hereto.) Mr. Meyers clarified that, at the time he prepared the

document, he was Rockwell's Director of Safety, Safeguards, and Security, a position in which he directly reported to Mr. Sanchini and oversaw Rockwell's environmental division.

62. During our depositions in April 1994, we obtained further confirmation of Rockwell's management's knowledge of the pondcrete problems prior to May 23, 1988. On April 22, 1994, I deposed Gary Potter. In the Fall of 1987, Mr. Potter was a Rockwell mid-level manager holding the title of Manager of Health, Safety & Environmental Operations Management. Mr. Potter testified that, in September 1987,

> [w]e had evidence that there were elevated levels of contamination on the 750 Pad. We also had evidence that the pondcrete blocks were not solidifying in the form that they were originally envisioned to be solidified. We had numerous meetings--when I say we, myself, and what would have been George Setlock and his subordinates, met with Ed Naimon [Rockwell's Manager of Waste Operations, who was overseeing pondcrete production] . . . to discuss this.

(See Exhibit F hereto.) Most significantly, however, Mr. Potter testified that this information about pondcrete not solidifying and the leaching of hazardous constituents from the blocks was conveyed to Mr. Sanchini and his general staff, consisting of his division Directors, and was a topic of concern to them in that time period (Fall 1987).

63. I note that one of the documents attached to Rockwell's response (Ex. C(11)), which as best I have been able to ascertain was not in our possession when we filed our Notice in March 1992, is a document entitled "Implementation Plan for Environmental Survey Findings Revision 1.0," dated February 2, 1988. This document was signed by G.W. Meyers and George Campbell, among others. This document (at p. 2.5.14) contains the statement that "To date, no confirmed leaching of hazardous

constituents out of the pondcrete has been identified." Taking into account Mr. Potter's testimony in April 1994 that Sanchini's general staff (of which Messrs. Meyers and Campbell were members) was concerned about leaching during the Fall of 1987 and held meetings to discuss the problem, coupled with the note referenced above from Meyers to George Campbell discussing Sanchini's concerns about pondcrete (the latter we admittedly did have in March 1992), the statement in the Implementation Plan appears to have been a knowing false statement by Messrs Meyers and Campbell.

64. Still more information regarding Mr. Sanchini's level of knowledge was obtained by us when Rockwell produced documents in December 1994. Attached to this Declaration as Exhibit G are handwritten documents showing that, during the Fall of 1987, Mr. Sanchini's subordinates, including Mr. Naimon, proposed as using plywood boxes as an alternative to the weaker tri-wall cardboard containers to hold the pondcrete blocks, but that Mr. Sanchini rejected this suggestion. This information, which we did not have when we declined in March 1992, coupled with the other newly obtained information confirming that Mr. Sanchini knew of the insolid condition of the pondcrete during the Fall of 1987, and, therefore, puts to rest any contention by Rockwell that our evidence fails to establish liability in light of the contractual provision mentioned above (even assuming, arguendo, that Rockwell is correct on the contract interpretation issue, which we deny).

65. I have reviewed the documents attached to Rockwell's response, which Rockwell alleges were available to DOJ-Civil at the time we filed our Notice of Declination on March 26, 1992.

66. The vast majority of those documents were not in our possession, and were not otherwise known to us, when we declined the case on March 26, 1992, and, therefore, constitute new evidence justifying intervention. They were

not supplied to us by the criminal prosecutors or by Rockwell prior to our decision to decline. The following documents attached to Rockwell's response were first obtained by us at various times subsequent to our filing of the Notice of Declination (and, indeed, subsequent to June 1, 1992, when the criminal court accepted Rockwell's guilty plea):

(a) 3/4/92 draft of the Plaintiff's Sentencing Memorandum (Exhibit 5 to the Affidavit of Bryan Morgan).

(b) Final version of the Plaintiff's Sentencing Memorandum (Exhibit 6 to Morgan Affidavit).

(c) Plaintiff's Supplemental Sentencing Memorandum (Exhibit 7 to Morgan Affidavit).

(d) Waste Rejection Reports stating that Rockwell had detected "leaking" pondcrete boxes on the Pads (Exhibit 10 to Morgan Affidavit).

(e) Implementation Plan For Environmental Survey Findings Revision 1.0 (Exhibit 11 to Morgan Affidavit).

(f) Weekly Inspection Logs showing that Rockwell was detecting "leakers" on the Pads on a consistent basis from July through November 1987 (Exhibit 15 to Morgan Affidavit).

(g) The Environmental Protection Agency ("EPA") report of the interview of Rockwell employee Howard Long (Exhibit 19 to Morgan Affidavit).

(h) FBI interview memorandum of Howard Long (Exhibit 20 to Morgan Affidavit).

(i) EPA interview report of Rockwell employee Ronald Teel (Exhibit 21 to Morgan Affidavit).

(j) EPA interview of Rockwell employee Daniel Tallman (Exhibit 22 to Morgan Affidavit).

(k) EPA interview of Rockwell employee Patricia D. McNeil (Exhibit 23 to Morgan Affidavit).

(l) EPA interview of Department of Energy employee ("DOE") Frank E. Bingham (Exhibit 24 to Morgan Affidavit).

(m) EPA interview of DOE employee Peter K. Fitzsimmons (Exhibit 25 to Morgan Affidavit).

(n) EPA interview of DOE employee Layton J. O'Neill (Exhibit 26 to Morgan Affidavit).

(o) EPA interview of Rockwell employee Allen Shubert (Exhibit 27 to Morgan Affidavit).

(p) EPA interview of Rockwell employee Richard Kyron Garrett (Exhibit 28 to Morgan Affidavit).

(q)-(kk) EPA or FBI interviews of Fred Brooks (Rockwell), Jack Giron (Rockwell), Gilbert Guterrez (Rockwell), Darryl Hornbacher (Rockwell), Stephen L. Kaiser (Rockwell), Delores Marie Krieg (Rockwell), Joseph Krupar (DOE), Wanda Elaine Lewis (Rockwell), John Leroy Lucy (Rockwell), Harber. A. McClearen (Rockwell), William C. Rask (DOE), Ronald Dean Reed (DOE), Paul Robledo (Rockwell), Ronald Roundtree (Rockwell), Hans W. Sattler (Rockwell), Robert D. Shankland (EPA), Mark Van Der Puy (Rockwell), Timothy Kim Freedman (Rockwell), John Robert Boland (DOE), Candice Jieree (DOE), and Eugene W. Kendall (Reynolds Electrical and Engineering Co.) (Exhibit 29 to Morgan Affidavit).

67. Of the material submitted by Rockwell in its response to the instant motion, the following documents were available to DOJ-Civil at the time of declination:

(a) 9/28/87 memorandum from F.J. Blaha to G.L. Potter (Exhibit 2 to Morgan Affidavit).

(b) Handwritten notes (Exhibit 3 to Morgan Affidavit).

(c) Handwritten note from "Wayne" to George Campbell, dated 9/9/87 (Exhibit 4 to Morgan Affidavit).

(d) Handwritten note dated 1/5/88 entitled "Top Priority Pad Inspection" (Exhibit 8 to Morgan Affidavit).

(e) 10/8/87 memo from G.L. Potter to E.R. Naimon and attachments (Exhibit 9 to Morgan Affidavit).

In its November 11, 1991 submission, in addition to the foregoing five documents, Rockwell provided other material to us including its own memoranda of interview of approximately 27 Rockwell employees, and other documents pertinent to the ES&H violations to which it planned to plead guilty. While Rockwell supplied us with its interviews of some of the individuals whom the criminal investigators interviewed, it was only after we received the government's interviews (post-declination) that we learned the full extent of those witnesses' knowledge.

D. Correction of Other Erroneous Statements by Rockwell.

68. Finally, I wish to correct some of the other erroneous statements made by Rockwell in its response. For example, on page 14 of its memorandum, Rockwell asserts that "DOJ" had 14 boxes of grand jury subpoenaed documents for "30 months before filing its Declination Notice." Since this statement comes in a section of Rockwell's memorandum where it is arguing that DOJ-Civil has new information warranting intervention, the impression given is that DOJ-Civil had access to the grand jury subpoenaed documents. That is not so. As already indicated, DOJ-Civil did not have any grand jury subpoenaed documents prior to its declination decision. Indeed, when we moved to obtain such documents in March

1994, Rockwell opposed our motion and the Court denied us access. (See Rockwell's memorandum in support, at 12, note 5.) We did not obtain these documents until Rockwell finally acceded in producing them to us in January 1995.

69. Moreover, during the plea negotiations between the prosecutors and Rockwell during the Fall of 1991, Rockwell attempted to obtain an agreement blocking any future access to grand jury information by all third parties, which would have included DOJ-Civil, after the completion of the grand jury investigation, and the government rebuffed Rockwell's effort. Obviously, since Rockwell was attempting to block our future access to such information, Rockwell knew that, when we considering declining, we lacked access to it.

70. Rockwell does the same thing in reference to interview memoranda prepared by criminal investigators. It asserts at page 14 of its memoranda that "DOJ" had interviews of 13 Rockwell employees (whom we later deposed) when, we declined in March 1992. As already stated above, we in DOJ-Civil did not have those interviews until dates subsequent to June 1992.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 20th day of December 1995, at Washington, D.C.

/s/ John A. Kolar
John A. Kolar

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Richard P. Matsch

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA *ex rel.*
JAMES S. STONE,

Plaintiff,

v.

ROCKWELL INTERNATIONAL CORPORATION,

Defendant.

MEMORANDUM OPINION AND ORDER

MATSCH, Chief Judge

On November 14, 1995 the United States moved to intervene in this *qui tam* action pursuant to 31 U.S.C. §3730(c)(3) and Rule 24(b) of the Federal Rules of Civil Procedure. This case was initiated by a complaint filed by James S. Stone, as relator, on July 5, 1989. The first claim for relief alleges that Rockwell International Corporation ("Rockwell"), as contractor operating the Department of Energy ("DOE") facility at Rocky Flats Nuclear Weapons Plant ("Rocky Flats"), committed wrongful acts and submitted false claims for reimbursement of costs and applications for fee awards under the contract in violation of the False Claims Act, 31 U.S.C. §3729. Mr. Stone contends that Rockwell knowingly and fraudulently caused the United States to receive less property or property of a diminished value and utility than that to which it was contractually entitled and that Rockwell concealed

violations of federal and state environmental and safety laws which, if known, would have adversely affected the payments it obtained through DOE. The complaint remained under seal until November 13, 1990, pursuant to orders extending the statutory time for the Department of Justice - Civil Division ("DOJ-Civ") to determine whether it would intervene and take over this action.

The Criminal Division of the Department of Justice, including the United States Attorney in this district, acting with other agencies, began investigating allegations of environmental crimes at Rocky Flats in 1988. In June 1989, agents of the Federal Bureau of Investigation and other federal law enforcement officers conducted an extensive search at Rocky Flats and other facilities of Rockwell and DOE under the authority of a federal search warrant. Documents were seized from Rockwell and from DOE. In August 1989, a special grand jury was empaneled for the specific purpose of investigating operations at Rocky Flats. The prosecutors conducting that investigation reported that approximately three and a half million pages of documents were reviewed; more than 800 witnesses were interviewed and that approximately 110 witnesses, including senior DOE officials and Rockwell blue collar workers, testified before the special grand jury.

The end result of the criminal investigation was a carefully negotiated plea agreement under which Rockwell waived indictment and pleaded guilty to an information charging ten environmental crimes on March 26, 1992. Rockwell paid stipulated fines totaling $18.5 million on June 1, 1992 when Judge Finesilver accepted the plea agreement under Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure.

The government agreed not to bring other criminal environmental and related charges against Rockwell or its officers, directors or employees. Additionally, the United States agreed not to pursue civil or administrative actions against Rockwell for violations of the Resource

Conservation & Recovery Act, the Clean Water Act, the Clean Air Act, the Toxic Substances Act, or the Comprehensive Environmental Response, Compensation, and Liability Act. Although DOJ-Civ filed a notice that it declined to intervene in this case on the same day the Plea Agreement was filed, and although non-intervention was discussed during the plea negotiations, the Plea Agreement explicitly excluded the issues in this case from the government's covenant not to sue.

Other litigation between the government and Rockwell was pending during the plea negotiations. On August 15, 1991 Rockwell sued the United States in the Court of Federal Claims for breach of the contract between Rockwell and the DOE governing the operation of Rocky Flats. *Rockwell v. United States*, Case No. 91-1362. Rockwell alleged that DOE headquarters impermissibly caused DOE field officers to reduce Rockwell's award fees to an amount $6.5 million below what it should have received. That case was also discussed during the plea negotiations when Rockwell unsuccessfully attempted to reach a "global settlement." On November 3, 1995 the United States filed a motion for leave to file an amended answer asserting counterclaims under the False Claims Act and forfeiture of Rockwell's claims because of fraud as provided in 28 U.S.C. §2514. On July 17, 1996 Judge Yock granted that motion, determining that Rockwell would not be unfairly disadvantaged or prejudiced because it had notice that the government was considering filing such a motion as early as 1992 and because Rockwell contributed to discovery disputes delaying development of the Federal Claims Court case.

Counsel for the government say that the motion to intervene in this case results from information obtained through discovery in *Rockwell v. United States* and from additional information developed by counsel for Mr. Stone in this action. They contend that they now have evidence, which they did not previously have, that Rockwell

intentionally concealed and misrepresented its environmental and safety performance in the submissions to DOE for contract payments. On December 21, 1995 Mr. Stone filed a pleading in support of the government's motion for leave to intervene. Rockwell filed its opposition to the government's motion on December 14, 1995, arguing that the motion violated the Plea Agreement and that the government has failed to demonstrate "good cause" for intervening more than three years after filing its notice declining to intervene.

This court has ruled, in a separate memorandum opinion and order in the criminal case, that the government's motion for leave to intervene in this case does not violate the Plea Agreement. Thus, the question now to be decided is whether the government's intervention may be permitted under §3730(c)(3) and Rule 24(b).

Rockwell argues that "good cause" under the False Claims Act means that the government must demonstrate that it has "new evidence discovered after the first 60 days of the litigation [that] could escalate the magnitude or complexity of the fraud, causing the Government to reevaluate its initial assessment or making it difficult for the qui tam relator to litigate alone." That language is from legislative history. S. Rep. No. 99-345, at 26 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291. Rockwell contends that the publicly filed sentencing memorandum submitted by the government in support of the Plea Agreement discloses Rockwell's concealment from the DOE, the EPA, and the Colorado Department of Health, of contamination from "pondcrete" and "saltcrete" wastes to avoid compliance with state and federal regulations and to avoid "detrimental impacts on [award fee] evaluations" under its contract with DOE. This court has read that sentencing memorandum and finds that it does not, in itself, disclose a basis for concluding that Rockwell violated the False Claims Act. Significantly, the prosecution advised the court that DOE bore substantial responsibility for environmental and waste

management violations, attributing failures of oversight to an agency "culture" that placed nuclear weapons production above all else, and especially above compliance with environmental and hazardous waste laws and regulations.

"Good cause" under 31 U.S.C. §3730(c)(3) is not as limited as Rockwell suggests. The 1986 Senate Report, cited by Rockwell, describes the history of the False Claims Act, beginning with its original enactment in 1863, during the Civil War. The authority to file *qui tam* actions was deemed necessary to protect the government from fraudulent contractors. Courts interpreted the statute to permit a relator to proceed with *qui tam* actions even if he did not supply the information forming the basis of the claim. In the early 1940's some False Claims suits were brought by relators based on criminal indictments filed by the government. The government objected, arguing that a *qui tam* action should be barred when it was based only on information revealed in the criminal indictment. The race to the courthouse between the government and private parties infringed on the government's control over its criminal and civil fraud cases and hampered effective law enforcement. The Supreme Court found the statute to be restrictive of the government's control in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

This decision prompted the 1943 amendments in which the Congress established a jurisdictional bar to private suits based solely on information in the possession of the government at the time the suit was brought, even if the relator was the original source of the information. *United States v. Aster*, 275 F.2d 281 (3d Cir. 1960); *United States v. Pittman*, 151 F.2d 851 (5th Cir. 1946). Under those amendments, if a court determined that a *qui tam* litigant was not a proper relator because of the jurisdictional bar, he lost any right to continue in the litigation, share in any proceeds, challenge the government's reasonable diligence, or object to settlements.

The 99th Congress passed the 1986 amendments to

strengthen the *qui tam* provisions to make them "a more effective vehicle for private individuals to disclose fraud" which was thought to be necessary "both for meaningful fraud deterrence and for breaking the current 'conspiracy of silence' among Government contract employees." S. Ref. No. 99-345, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5279. The 1986 amendments were designed to strike a balance between encouraging private prosecution of fraudulent claims against the government and deterring frivolous or vexatious suits. The reward provision was changed to permit 25 to 30 percent of the recovery if the relator proceeds alone but only 15 to 25 percent if the government intervenes in the action. 31 U.S.C. §3730(d). Government intervention late in the proceedings may be unfair to a relator who has expended considerable resources to advance the case and then lose up to half of the reward for bringing the action. The language quoted by Rockwell from the Senate Report regarding "new evidence . . . [that] could escalate the magnitude or complexity of the fraud . . . ." must be read in the full context of the report. Such reading leads to the conclusion that the "good cause" requirement of §3730(c)(3) was intended to protect the interests of the relator.

In this case, James Stone is fully supportive of the government's motion to intervene. He has argued that this case is still in a very preliminary stage because Rockwell has resisted discovery. Judge Yock made a finding of undue delay in discovery in the case before the Federal Claims Court. The relationship of these two actions is apparent and now that the government has been permitted to raise the fraud issues in responding to Rockwell's claims, there is no prejudice to Rockwell in permitting intervention by the government in this case.

Even if good cause requires a showing of new evidence, the government has sustained that burden. DOJ-Civ was not privy to the information developed during the criminal investigation. Rule 6(e) of the Federal Rules of Criminal

Procedure prevented the prosecutors from disclosing what was developed in the grand jury proceedings. The publicly filed documents are not clear as to the role of the DOE officials. What knowledge they had and what reliance they placed on Rockwell's reports are relevant considerations in a fraud action. The declarations filed by John A. Kolar, DOJ-Civil Division trial attorney, persuasively show that information obtained during discovery in the claims court case and made available to him by counsel for Mr. Stone have been important to the decision to intervene.

What is of paramount importance is the public interest. The operation of Rocky Flats has fueled considerable controversy over many years and the highly publicized investigation and criminal prosecution have been the subject of public debate. The former members of the special grand jury have filed a separate civil action seeking an order releasing them from the grand jury oath of secrecy because they are in disagreement with the end result of their work and do not regard the Plea Agreement as a just disposition.

This civil action provides an appropriate forum for a public inquiry into the management of this important defense facility and participation in it by the goverment will add significantly to the completeness and fairness of any trial. Accordingly, it is

ORDERED that the motion to intervene is granted.

DATED: November 19, 1996

BY THE COURT:

/s/ Richard P. Matsch

Richard P. Matsch, Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA ex rel. JAMES S. STONE,	)	
Plaintiff,	)	92 CR 107 M
vs.	)	89 M 1154
ROCKWELL INTERNATIONAL CORPORATION,	)	
Defendant.	)	

SCHEDULING CONFERENCE TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 2:30 p.m. on the 5th day of December, 1996, in Courtroom C-203, United States Courthouse, Denver, Colorado.

* * *

[13] forfeiture.

MR. KOLAR: Absolutely. The claim is wholly forfeited.

THE COURT: Yeah.

MR. KOLAR: So that if we—

THE COURT: It's not a dollar for dollar; it's just forfeiture of the claim.

MR. KOLAR: It goes away.

THE COURT: Yeah.

MR. KOLAR: We would--we intend in the amended

complaint to assert the typical legal theories that we append to False Claims Act cases, such as common law fraud, unjust enrichment, breach of contract, all of which are obviously simply different theories based upon the same underlying facts. And one of the theories that we would assert in the amended complaint, or seek to, is common law fraud, the elements of which closely correspond to the elements of the special plea in fraud.

So if we succeed in this case on that theory, then we will have--Rockwell's claim will be forfeited in the Court of Federal Claims.

THE COURT: Well, what do you intend to do in this civil case, 89-1154, with respect to amended pleading?

MR. KOLAR: We would--well, we've agreed in the parts of the scheduling order we agree on to submit an amended complaint by December 20th. Most of that is not all that [14] problematic.

THE COURT: Now, is that going to be a consolidated complaint, amended complaint, with both the relator and the government?

MR. KOLAR: That question cuts right to the center of an issue that we're still trying to resolve with Mr. Stone's counsel. There are theories that overlap between the Claims Court case that we have been pursuing there, and the theories in this case. And then there are three issues that Mr. Stone has been asserting all along in this case that we have not been pursuing in the Claims Court case, and by the 20th, we have to--we're striving, we're going to strive to either come to one of--well, I suppose I won't count them, I'll just say what they are. One result would be that we adopt the--we only assert in the amended claim the ones that are already in--that we've been pursuing in the Claims Court case, and leave to Mr. Stone the others. Or we adopt all of them, or some subset of the three that Mr. Stone wants to pursue, or that Mr. Stone decides after further consultation

with us to abandon one or more of those other three claims. That is a possible result.

THE COURT: Well, there can still be a consolidated complaint but separate claims stated.

MR. KOLAR: That's right.

THE COURT: If that's the resolution. [15]

MR. KOLAR: Yes.

THE COURT: But if we're going to have an amended complaint, I'd like to have both plaintiff parties in it so that we don't have so many pleadings.

MR. KOLAR: I understand, Your Honor, and that seems to me to make sense.

But in any event, to go back to the issue about prejudice because of the Claims Court case, you know, the other point I think the Court needs to--I think the overriding point, quite frankly, that the Court has to consider is that Mr. Stone--I'll take the liberty of speaking for their interests for a moment--Mr. Stone is prejudiced if the case goes forward solely in the Claims Court and the case is stayed here. Mr. Stone can't participate in the Claims Court case, and I suspect, Your Honor, that if per chance Rockwell succeeds in that case, they would argue that their success against the United States in that forum creates a collateral estoppel effect against Mr. Stone's claims in this case. And it just seems to me basic justice that one of the parties who by statute is permitted to, and in fact brought the case to start with, ought to be-- the case should proceed in the forum where that party can participate.

Finally, we--Mr. Haddon said, you know, all the parties to some extent try to assess these--where their interests are going to be, where they're going to be most

* * *

[26] Now, the Court's ruling that resolved those two issues, one I believe was in the criminal case which said we--

I don't find this reasonable understanding argument to be meritorious, and the second ruling was just issued in this case, which was there is no statutory good cause. But that is precisely the argument that I don't think there was ever any dispute was properly raised--

THE COURT: There is no statutory good cause?

MR. KOENIGS: I apologize. There is statutory, yes.

THE COURT: Yes. I thought that's what I ruled.

MR. KOENIGS: Right. I misspoke. But that is precisely the issue that we raised in our criminal motion, precisely the issue that is properly on appeal there. The only difficulty is the order was entered in this case. And so it does seem that for the Tenth Circuit--I cannot understand how the issue can properly be dealt with on appeal. Beyond that, I believe that the issue was raised and was properly decided in that case, and that's why I candidly concede that a proper resolution of the issue is to either issue that order jointly in both cases, or incorporate that order by reference in the criminal case, because that is part and parcel, I respectfully submit that it is--that the criminal case is dependent in part on that ruling, because that was precisely the argument made by Rockwell in that criminal proceeding.

THE COURT: Okay. Well, rather than attempting to deal [27] with these issues in terms of fairness and prejudice, I think that the appropriate thing is to deal with them in accordance with the statute and the rules. And as I indicated in the beginning, I think that each of these decisions, the one to deny the defendant's motion in 92 CR 107 to really enjoin intervention in the civil case as a violation of the plea agreement using ancillary jurisdiction under the criminal case. That was resolved on its own merits with respect to this Court's interpretation of the plea agreement, and that the motion to intervene in the Stone case was resolved on the basis of the interpretation of the statutory requirement of good cause for intervention, late

intervention, and that these are independent grounds for the rulings. And I'm going to still treat them separately.

So with respect to the motion to stay enforcement of the order in 92 CR 107, it's denied. And with respect to the motion of Rockwell to certify the order granting the government's motion to intervene in 89 M 1154, it's denied because the statutory requirements under 28 USC 1292(b) are not met. That then--and of course I'm sure that counsel will be able to inform the Court of Appeals in the criminal appeal of the existence of the intervention ruling by including it in an appendix or whatever the appropriate procedure is before the Court of Appeals so that you not be denied the opportunity to give the Court of Appeals a complete picture.

[28] Now, that takes us back to the scheduling conference in the civil case, Stone, and I want to talk about that in several--with several preliminary observations. I note in my general review of the record of that case that when it was before Judge Carrigan, there were a number of status conferences and the like, and there were also apparently settlement conferences and efforts undertaken by Magistrate Judge Pringle in that regard, and some discovery issues with him as well. In fact, as has been pointed out in this draft of scheduling order, there are some motions to be decided yet, and one is an objection to a magistrate judge's recommendation, I believe.

I'm not going to divide this case, the Stone case, between me and a magistrate judge. I'll do my own scheduling and discovery and motion practice.

The second thing is that I don't intend, and I just mention this so that counsel don't have to be tender about it, I don't intend to reassign this case because of other litigation that occupies me. I can do more than one thing at a time. So this case doesn't need another transfer of judges.

And it does seem to me in this quick review of the

scheduling order, and of course I didn't expect you to be able to come in this afternoon with an agreed scheduling order. In fact I thought better of it, I think, when I noted [29] that we had sent out the forms for you to work with, that this is more like a status conference than a true scheduling conference is normally done here. But it has helped I think to look at this draft, and it is obvious that we need an amended complaint, and it should be a consolidated amended complaint, as we've already discussed, and December 20th seems a reasonable time to do that.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

CIVIL ACTION NO. 89-C-1154

UNITED STATES OF AMERICA,
ex rel. JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION, THE BOEING CORP.,
BOEING NORTH AMERICAN, INC.

Defendants.

AMENDED COMPLAINT

False Claims Act [31 U.S.c. §§ 3729-3733]
Common Law Fraud, Breach of Contract,
Payment By Mistake, and Unjust Enrichment

Plaintiff, United States of America, and relator, James S. Stone, by their respective attorneys, allege as follows:

PARTIES

1. Plaintiff is the United States of America (hereinafter "United States" or "government"), suing on behalf of its agency, the United States Department of Energy ("DOE").

2. The relator, James S. Stone, is a resident of the District of Colorado
and a former employee of Rockwell. Mr. Stone initially commenced this lawsuit on July 5, 1989.

3. Defendant Rockwell International Corporation ("Rockwell") is a Delaware corporation headquartered in Seal Beach, California in Orange County, California.

4. Defendant The Boeing Corporation ("Boeing"), is a Delaware corporation headquartered in Seattle, Washington. On information and belief, during December 1996, Boeing acquired or merged with components of Rockwell, including the Rockwell component which held and performed the contract at issue in this action. Also, on information and belief, Boeing, pursuant to this acquisition or merger transaction, formed a subsidiary called "Boeing North American, Inc." ("Boeing NAC"), to which any and all liability by Rockwell to plaintiff United States under the contract at issue in this action was assigned or transferred. Accordingly, the United States and relator Stone name Boeing and Boeing NAC as additional defendants herein, based upon their assumption of liability from Rockwell.

JURISDICTION AND VENUE

5. The Court has jurisdiction over this matter pursuant to 31 U.S.C. §§ 3729-3732, 28 U.S.C. § 1345, and its general common law and equitable jurisdiction.

6. Venue is proper in the District of Colorado pursuant to 28 U.S.C. § 1391, and 31 U.S.C. § 3732.

FACTS ALLEGED BY THE UNITED STATES AND RELATOR

7. The United States and the relator allege the following facts.

A. The Rockwell Contract

8. Rockwell and the United States, acting through a predecessor agency to the Department of Energy ("DOE), to wit, the Atomic Energy Commission ("AEC"), entered into Contract No. AT(29-2)-3533, effective June 30, 1975, for the operation by Rockwell of the Rocky Flats nuclear weapons plant.

9. Upon the transfer of the functions and responsibilities of the AEC to the Energy Research and Development Administration ("ERDA"), the contract was redesignated Contract No. E(29-2)-3533 by Modification ("Mod") No. M002, effective October 1, 1976, and was

amended in certain particulars specified in Mod 2.

10. Upon the transfer of the functions and responsibilities of ERDA to the DOE, the contract was subsequently redesignated as Contract No. DE-AC04-76DP03533. By Mod 005 to Contract No. DE-AC04-76DP03533, the contract was converted from a cost-plus-fixed-fee type to a cost-plus-award-fee type ("CPAF"), effective February 1, 1979.

11. Effective January 1, 1981, Rockwell and DOE entered into a Supplemental Agreement, which agreement constituted the 19th Mod to Contract No. AT(29-2)-3533, designated "Mod 019 to Contract DE-AC04-76DP03533," which provided in pertinent part:

> WHEREAS, the Government and the Contractor entered into Contract AT(29-2)-3533 on January 8, 1975, effective June 30, 1975 for the performance by the Contractor of certain work and services; and
>
> WHEREAS, this contract has previously been amended by Modifications Nos. 1 through A018; and
>
> WHEREAS, the parties hereto desire to extend the term of said contract, [and] to amend it in certain other respects ....
>
> * * * *
>
> NOW, THEREFORE, the parties agree that the contract, as previously amended, is hereby further amended ... .

Mod 019 governed Rockwell's performance during the time period from January 1, 1981 through December 31, 1985.

12. Effective January 1, 1986, Rockwell and DOE

entered into Mod M087 of Contract DE-AC04-76DP03533, which governed Rockwell's performance from January 1, 1986 through December 31, 1988. Mod M087 contained language similar to that in paragraph 46, above, stating that it was an extension of Contract AT(29-2)-3533.

13. Effective January 1, 1989, Rockwell and DOE entered into Mod M124 of Contract DE-AC04-76DP03533, which was to govern Rockwell's performance commencing January 1, 1989. Mod M124 contained language similar to that in paragraph 46, above, stating that it was an extension of Contract AT(29-2)-3533.

14. In February 1989, Rockwell and DOE entered into Mod M128, denominated "Supplemental Agreement to Contract DE-AC04-76D03533," which amended the contractual provisions relating to the amounts potentially payable to Rockwell for award fees. This Mod was effective retroactive to October 1, 1988.

15. From time to time, during the period from January 1, 1981 through December 31, 1989, Rockwell entered into other modifications to the contract, all of which constituted modifications, amendments, and extensions of Contract AE(29-2)-3533. Effective January 1, 1990, Rockwell was succeeded by another company, EG&G, as the management and operating contractor for Rocky Flats. Contract AE(29-2)-3533 between Rockwell and the DOE, and its various modifications, amendments and extensions, is referred to hereinbelow as "the Rocky Flats Contract."

B. <u>Pertinent ES&H Laws and Requirements</u>

16. The Rocky Flats contract specifically stated that Rockwell was required to comply with certain environmental, safety and health ("ES&H") statutes, laws, regulations, standards, and rules and orders of DOE in managing and operating the Rocky Flats Plant.

17. Beginning in the early or mid-1980's, and continuing through December 31, 1989, the ES&H statutes, laws, regulations, standards, and rules and orders of DOE with which Rockwell, by contract, was required to comply in

managing and operating the Rocky Flats Plant included, for instance, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seg., as amended, and the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251, et seg., and various DOE orders implementing requirements of these regulatory schemes. In order to satisfy its contractual obligations to comply with applicable ES&H laws and regulations, and to continue to receive payments under its contract, Rockwell submitted applications and related regulatory materials to the United States and certain state agencies, and was required to fully and truthfully disclose to government matters relating to its ES&H performance at the Rocky Flats plant.

18. The applicable ES&H orders included, for example, DOE Order 5480.2, entitled "Hazardous and Radioactive Mixed Waste Management," effective December 13, 1982, which acknowledged that DOE operations not conducted under the authority of the Atomic Energy Act were subject to EPA and State regulations relating to RCRA; and DOE Order 5820.2, entitled "Radioactive Waste Management," effective February 6, 1984, in which DOE established policies and guidelines for the management of radioactive wastes by its contractors. Other orders governing performance by DOE contractors in the ES&H area were implemented, and/or updated or amended, by DOE from time to time.

1. RCRA

19. The RCRA prohibits the treatment, storage and disposal of hazardous wastes without a permit or interim status. In order to obtain a RCRA permit or interim status, a facility must submit a RCRA Part A permit application and subsequently a Part B application, which must be approved by federal and/or state authorities. In order to treat, store or dispose of hazardous wastes at an interim facility, RCRA requires compliance with rules and regulations promulgated at Title 6, Colorado Code of Regulations ("C.C.R.") 1007-3.

20. As used below, "hazardous wastes" are those substances and materials listed or otherwise identified as hazardous wastes in 6 C.C.R. 1007-3. "Mixed wastes" or "mixed hazardous wastes" are wastes which contain both radioactive wastes and non-radioactive hazardous wastes. "Low-level mixed wastes" are radioactive wastes containing both transuranic material at or below 100 nanocuries per gram and hazardous wastes.

21. On July 31, 1986, DOE, the United States Environmental Protection Agency ("EPA") and the Colorado Department of Health ("CDH") entered into a Compliance Agreement in which DOE agreed that Rocky Flats' low-level mixed wastes were RCRA-regulated by EPA and CDH ("RCRA Compliance Agreement"). Rockwell knew of this agreement.

22. On May 1, 1987, DOE issued a "final interpretive rule" making it clear that RCRA applied to all DOE mixed wastes, including low-level mixed wastes. Under this rule, effective June 1, 1987, DOE stated that the non-radioactive hazardous component of mixed wastes at DOE facilities (including Rocky Flats) was subject to RCRA regulation. Rockwell knew of this rule.

2. <u>The CWA</u>

23. One of the country's principal water pollution laws is the Clean Water Act ("CWA" or "the Act"). The Act prohibits the discharge of any pollutant from any point source into "navigable waters" except in accordance with the terms and conditions of a National Pollutant Discharge Elimination System ("NPDES") permit. See 33 U.S.C. §§ 1311(a), 1342. NPDES permits regulate waste water treatment facilities, and establish specific prohibitions, terms and conditions on discharges from a particular pollution source, regulate the type, amount and manner of such discharges and require that they be carefully monitored and reported to EPA or other appropriate authorities. The permit system, which requires the permit holder to report any and all violations of the permit, is one of

the statute's principal means for maintaining (and improving) the nation's important water resources.

24. The CWA prohibits the discharge of any pollutants from a point source into waters of the United States except in accordance with the terms and conditions of a NPDES permit, issued pursuant to 33 U.S.C. § 1342.

25. Rocky Flats has had several NPDES permits from 1974 to the present time (collectively, "NPDES permits"). For instance, in April 1981, EPA issued a NPDES permit to Rocky Flats. In November 1984, after that permit expired, EPA issued another NPDES permit to Rocky Flats. Among other things, these NPDES permits set specific limits on the kinds of discharges that Rockwell, as operator, could make into waterways. The NPDES permit also governed Rockwell's spray irrigation operations.

C. Provisions in the Rocky Flats Contract Expressly Requiring ES&H Compliance

26. As already noted, the Rocky Flats Contract, and its various mods, contained provisions expressly requiring Rockwell to protect human health and to comply with certain ES&H requirements and standards.

27. By way of example, Mod M087 of the Rocky Flats contract, in Clause 16, provided in pertinent part that Rockwell agreed to comply, inter alia, with all requirements of Section 308 of the CWA, 33 U.S.C. § 1318, relating to inspection, monitoring, entry, reports, and information, and to use best efforts to comply with clean water standards, including any enforceable limitation, control, condition, prohibition, standard, or other requirement promulgated under the CWA or contained in an NPDES permit. Mod M087 also provided, in Clause 48, that Rockwell would comply with all applicable safety and health regulations and requirements, including reporting requirements, of DOE. By reason of various DOE orders, the July 31, 1986 RCRA Compliance Agreement, and the May 1, 1987 final interpretative rule, RCRA compliance was among the health and safety requirements specifically imposed by DOE

upon Rockwell.

28. Mod M124, as amended by Mod M128, of the Rocky Flats Contract also required Rockwell to comply with ES&H requirements identical or similar to those described above, for the period October 1, 1988 through December 31, 1989. These Mods also contained language at Clause 74, which provided:

> Except as otherwise directed by the Contracting Officer, the Contractor [Rockwell] shall procure all necessary permits or licenses and abide by all applicable laws, regulations, and ordinances of the United States and of the state, territory, and political subdivision in which the work under this contract is performed.

Previous mods contained identical or similar language.

29. As more particularly alleged below, Rockwell did not comply with the ES&H provisions of the Rocky Flats Contract; to the contrary, Rockwell materially breached those provisions, including by committing numerous felony and misdemeanor violations of RCRA and the CWA in the course of its management and operation of the Rocky Flats plant. Furthermore, Rockwell concealed its material breaches and other ES&H problems from DOE, and, from time to time, misrepresented to DOE that it was complying with the contract. Rockwell thereby fraudulently induced DOE, inter alia, (a) to pay Rockwell more in award fees and other fees for performance, and to expend more in costs, than DOE otherwise would have paid and incurred, had DOE known the truth; and (b) extend the Rocky Flats Contract, including through Mod M124 of the Rocky Flats Contract, as amended by Mod M128.

D. Rockwell's Breaches of the Rocky Flats Contract and its Fraudulent Concealment and Misrepresentation to DOE

1. Pondcrete and Saltcrete

30. Under the RCRA Compliance Agreement described above, Rockwell was required to remove sludge from certain surface impoundments located on the Rocky Flats site, known as the "solar ponds." Rockwell undertook to do so by mixing the sludge from the solar ponds with cement to form a substance known as "pondcrete." Pondcrete took the form of large rectangular blocks weighing over 1,000 pounds a piece. At all material times, solar pond sludge was treated, and pondcrete was manufactured, in or about Building 788 on the Rocky Flats plant site.

31. "Saltcrete" was a mixture of cement, salts and salt brine from liquid waste treatment processes in Building 374 on the Rocky Flats site, shaped in large rectangular blocks weighing over 1,000 pounds a piece. At all material times, salts and salt brine were treated, and saltcrete was manufactured, in or about Building 374.

32. Beginning in July 1986, with the execution of the RCRA Compliance Agreement, Rockwell was required to comply with RCRA interim status storage requirements in storing pondcrete and saltcrete.

33. Colorado Hazardous Waste Regulations, found at 6 C.C.R. 1007-3, required Rockwell (a) to minimize the possibility of any unplanned release of hazardous waste constituents to air, soil, or water, (b) to handle pondcrete and saltcrete containers in a manner that would prevent them from rupturing and leaking, (c) to remedy any deterioration or malfunction of equipment or structures that might lead to an environmental or human health hazard, and (d) upon discovering that pondcrete and saltcrete containers were not in good condition and had begun to leak, to transfer such wastes to containers in good condition, to otherwise manage such wastes in compliance with RCRA interim status requirements, and to otherwise prevent their leakage into the environment.

34. On or about June 15-24, September 11-30, and December 7-16, 1987, February 15-24, May 6-25, July 18-27,

September 14-23, 1988 and February 6-15, 1989, Rockwell knowingly stored approximately 12,000 pondcrete and saltcrete blocks on an outdoor pad known as the "750 Pad" in violation of RCRA, all as set forth in the Plea

35. Agreement and Statement of Factual Basis agreed to by Rockwell on or about March 26, 1992, the terms and admissions of which are hereby incorporated by reference.

36. On or about October 5-9, November 16-20, December 14-18, 1987, January 18-22, February 22-26, March 21-25, April 18-22, May 16-20, June 6-15, August 1-10, and December 5-14, 1988 and June 1-10, 1989, Rockwell knowingly stored approximately 5,000 pondcrete and saltcrete blocks on another outdoor pad known as the "904 Pad" in violation of RCRA, all as set forth in the Plea Agreement and Statement of Factual Basis agreed to by Rockwell on or about March 26, 1992.

37. Beginning as early as April 1987, and probably earlier, Rockwell knew (a) that a substantial number of pondcrete and saltcrete blocks were not in fact solid; (b) that pondcrete was often a sludge-like or semi-liquid material; (c) that saltcrete was prone to expansion and crystallization; (d) that the processes it was using to manufacture pondcrete and saltcrete were inadequate to produce blocks of a uniform solidity that complied with RCRA requirements, and that the pondcrete manufacturing equipment was deteriorating and malfunctioning; (e) that the inspection process for pondcrete and saltcrete was inadequate to detect blocks that were insufficiently solid before the blocks were placed on the 750 and 904 Pads; (f) that various pondcrete and saltcrete containers on the 750 and 904 Pads had deteriorated, but that Rockwell had failed to remedy their condition; and (g) that pondcrete and saltcrete constituents were leaching from the blocks and were running off the 750 and 904 Pads, but that Rockwell had failed to correct this condition.

37. DOE, EPA, and CDH were led by Rockwell

to believe that the pondcrete and saltcrete blocks were sufficiently solid to comply with RCRA and the applicable provisions of 6. C.C.R. 1007-3, and the RCRA Compliance Agreement, and EPA permitted the storage of pondcrete and saltcrete blocks on the 750 and 904 Pads under these provisions based upon its belief that the blocks were sufficiently solid. From time to time, including on or about June 4, 1987, Rockwell falsely represented to DOE, EPA, and CDH that the blocks were sufficiently solid such that their storage on the Pads should be permitted pursuant to RCRA, 6 C.C.R. 1007-3, and the RCRA Compliance Agreement.

38. From time to time, in documents known as "Self-Analyses," and in other documents and records, which Rockwell submitted to DOE in furtherance of DOE's process of determining Rockwell's award fee and other payments, Rockwell misled DOE into believing that Rockwell was complying with RCRA and with the RCRA Compliance Agreement, when, in fact, Rockwell was not so complying. Furthermore, Rockwell misrepresented and concealed other material information concerning its ES&H record from DOE. The instances set forth below are exemplary, but not exhaustive, of Rockwell's misrepresentations and concealments.

39. For example, on or about June 23, 1987, in its award fee Self-Analysis, Rockwell told DOE that "a RCRA/CERCLA Program has been established and staffed effective June 8, 1987... [and] all Compliance Agreement dates have been and are being met."

40. Again in the September 1987 Self-Analysis, Rockwell advised DOE that "Rockwell's six-month self-appraisal provides ample demonstration of its progress in meeting a lengthy list of FY87 second half CPAF goals and objectives . . . The recent establishment of a RCRA/CERCLA Program is a clear expression of Rockwell's serious intent to be responsive to waste management requirements at Rocky Flats."

41. In its self-analyses dated December 23, 1987 and April 5, 1988, Rockwell again told DOE that "[a]ll RCRA Compliance Agreement requirements and schedules are being met. These statements were false and misleading for the reasons explained above.

42. DOE relied upon these and other misrepresentations and concealments, and Rockwell's various misrepresentations and concealments induced and caused DOE to award to Rockwell higher award fees, and to incur more in costs, than DOE otherwise would have awarded and incurred, had DOE known the truth.

43. Rockwell's improper handling of the pondcrete and saltcrete blocks resulted in the release of hazardous materials. In fact, on or about May 23, 1988, and possibly on other occasions, there was a spill of pondcrete blocks on the Pads. At this time, DOE, EPA, and CDH began to become aware of some aspects of the pondcrete and saltcrete problems described above. However, following May 23, 1988, Rockwell continued to conceal from, and misrepresent to, DOE (and others including the public and Congress) the fact that it had become aware of the pondcrete and saltcrete problems long before May 23, 1988, as well as the full extent of those problems. Instead of disclosing the truth about its knowledge, Rockwell created the false and misleading impression that it was ignorant of the problems until May 23, 1988. By its misrepresentations and omissions, Rockwell induced and caused DOE to award it higher award fees than DOE would otherwise have awarded, had DOE known the truth, and to continue to allow Rockwell to perform the contract, whereas, once DOE began to learn the true facts about Rockwell's poor performance, DOE took steps to replace Rockwell with a new contractor (i.e., EG&G).

2. <u>Concentrated Salt Brine</u>

44. As indicated above, as part of the July 31, 1986 RCRA Compliance Agreement, it was agreed that the solar ponds would be closed and their contents removed in

accordance with RCRA procedure (thereby requiring the production of pondcrete).

45. "Concentrated salt brine" was a waste generated from the liquid waste treatment processes in Building 374. From time to time prior to July 31, 1986, Rockwell transferred concentrated salt brine to the Solar Pond 207C, and stored the salt brine therein. Due to the closure of the solar ponds pursuant to the RCRA Compliance Agreement, in part because they were leaking into the environment, Rockwell was prohibited from transferring additional concentrated salt brine to Solar Pond 207C except under certain "emergency" circumstances, which were not satisfied in the case of the transfers described in the next paragraph, and probably others.

46. On or about August 13-17, October 9-12 and 14-18, November 15-19, and 24-27, and December 17-18, and 20-25, 1987, and January 4-8, 23-27, and January 29-February 1, February 3-7, 20-24 and February 27-March 2, March 6-10 and April 8-12, 1988, Rockwell knowingly transferred, treated and stored concentrated salt brine from Building 374 in Solar Pond 207C in violation of RCRA, all as more specifically set forth in the Plea Agreement and Statement of Factual Basis agreed to by Rockwell on or about March 26, 1992.

47. Rockwell failed to inform DOE that it was violating RCRA by transferring concentrated salt brine to Solar Pond 207C after entering into the RCRA Compliance Agreement. To the contrary, on or about August 22, 1988, for example, Rockwell misrepresented to DOE that, except for intercepted groundwater being returned to the solar ponds, "[n]o other waste is being accepted by the Solar Ponds, and has not been accepted for over a year," that is, since the summer of 1987. Rockwell thereby induced DOE to pay Rockwell higher award fees than DOE would have paid, had DOE known the truth, and to continue to allow Rockwell to perform the contract, whereas, once DOE began to learn the true facts about Rockwell's poor

performance, DOE took steps to replace Rockwell with a new contractor (i.e., EG&G).

3. CWA Violations

48. As stated above, Rockwell's Rocky Flats contract required Rockwell to comply with all applicable state and federal laws, including the CWA. The contract also required Rockwell to help DOE obtain permits required by such laws, and for Rockwell to comply with all required permits, including the NPDES permit, and other laws.

49. In 1984, or earlier, a NPDES permit was issued which authorized certain discharges at Rocky Flats. The NPDES permit was required by law. Under the NPDES permit, Rockwell, as the operator of the plant, was required to comply with the provisions of the CWA. Under the permit, Rockwell was required to conduct spray irrigation at the Rocky Flats plant in accordance with "good engineering practices". The NPDES permit also contained descriptions of the manner and types of discharges that were allowed, the monitoring requirements with which the permit holder was bound to comply, and reporting requirements.

50. Spray irrigation was intended to be a means of properly disposing of waste water (also known as effluent) generated by the sewage treatment plant at the Rocky Flats plant. Spray irrigation consisted of pumping effluent water from the B-3 Pond, which held sewage treatment waste water, to a system of pipes laid on the ground, from which the waste water was then sprayed over the fields surrounding the Rocky Flats plant. The theory behind spray irrigation was that the waste water would be disposed of by evapotranspiration (a combination of evaporation and uptake by plants--resulting in transpiration) and/or percolation (soaking into the ground), with no runoff or discharges of the waste water from the fields into waterways around Rocky Flats.

51. Based upon the presumption (later shown to be incorrect) that spray irrigation was being properly

performed such that effluent did not run off the fields into the waterways around the plant, Rockwell did not have to meet the same stringent testing procedures and contamination limits under the CWA and NPDES permit for the waste waters that were spray irrigated, as it had to meet if those same wastes were directly released into waterways.

52. In October 1984, Rockwell violated the Plant's NPDES permit when spray irrigation waste water ran off a spray field into McKay Ditch and flowed downstream to Walnut Creek below permitted Outfalls No. 005 and No. 006 at the A-4 and B-5 Ponds, respectively. On October 31, 1984, Rockwell formally notified DOE in writing of this runoff incident resulting from spray irrigation, and that it constituted a NPDES permit violation. The EPA advised DOE that this runoff incident violated the NPDES permit.

53. Rockwell assured DOE that such spray irrigation runoffs would not re-occur.

54. However, on March 2, 1987, a DOE employee observed spray irrigation effluent from the South Spray Field running to Woman Creek. The DOE worker reported the incident to DOE and Rockwell officials. Rockwell had not previously reported this or certain other spray irrigation problems to DOE. Once, DOE learned of it, however, as required under the NPDES permit, on March 6, 1987, Rockwell wrote a letter formally notifying DOE of the March 2, 1987 spray irrigation runoff incident, and that it violated the NPDES permit. This incident was also reported to EPA and CDH.

55. Rockwell again assured DOE that similar runoffs would not re-occur, and promised to take corrective actions to prevent future occurrences.

56. Rockwell's award fee was impacted by this second runoff incident. In DOE's award fee evaluation of Rockwell for the period of October 1, 1986 to March 31, 1987, DOE cited the NPDES violation as a "notable deficiency."

57. As discussed above, under the CWA, DOE and Rockwell, as operator of the plant, were required to report to EPA and CDH on a monthly basis any violations of the NPDES permit, including violations resulting from spray irrigation operations. DOE required Rockwell to notify DOE in writing on a monthly basis of any and all violations of the NPDES permit. DOE used this information supplied by Rockwell, among other things, to notify EPA and CDH of any violations.

58. Rockwell used a document titled Monthly Monitoring Report (hereinafter "MMR" or "MMR report") to identify and disclose to DOE any and all NPDES permit violations occurring during each prior month. Rockwell submitted a MMR report to DOE every month during the time periods at issue.

59. Rockwell knew that it was required to report in the MMR any and all violations of the NPDES permit resulting from Rockwell's spray irrigation practices.

60. After March 2, 1987 and through at least July 1989, Rockwell made numerous false statements in its MMR reports to DOE to conceal Rockwell's violations of the CWA and the NPDES permit, which violations arose from Rockwell's spray irrigation in violation of good engineering practices. Although Rockwell knew that it violated the NPDES permit on at least 40 occasions between May 18, 1987 and June 23, 1989, Rockwell falsely reported to DOE that it had not violated the NPDES permit during such time period, and otherwise concealed and omitted such violations from the MMR reports it provided to DOE, in this and prior periods.

61. In its criminal plea agreement, Rockwell admitted that it "knowingly" violated the NPDES permit and the CWA on the following days: May 18, June 19, July 9, 10 and 22, August 4, November 15 and December 4, 8, 9 and 25, 1987, January 4, March 2, April 22, May 19-20, November 14 and December 2, 9, 15 and 27, 1988, and January 7, February 1, 2, 8, 13, 20 and 25, March 4, 9, 28 and 30, April

11 and 21, May 10, 25 and 31 and June 5, 15 and 23, 1989.

62. Rockwell also admitted in its criminal plea that its spray irrigation practices caused substantial runoff from the East Spray Field into the North Walnut Creek drainage (including the A-4 Pond), the South Walnut Creek drainage (including the B-4 and B-5 Ponds) and the Woman Creek drainage (including the C-2 Pond), and that it knowingly spray irrigated over and adjacent to the "East Trenches," an abandoned burial ground for radioactive and hazardous wastes. Rockwell further admitted in its plea that these and other spray irrigation practices were in violation of the NPDES permit requirements that spray irrigation be done utilizing good engineering practices and prohibiting the bypassing of NPDES monitoring facilities.

63. Rockwell failed to disclose in its MMR reports any of the 40 instances of knowing violations contained in the criminal plea agreement.

64. In addition to omitting or failing to report to DOE in Rockwell's MMR reports its 40 knowing violations of the NPDES violations, Rockwell made affirmative false statements in many of the affected MMR reports regarding these violations. For instance, in certain of the MMR reports between May 1987 and July 1989, Rockwell affirmatively misrepresented to DOE that (1) no violations of the NPDES permit occurred during the month, and/or (2) no spray irrigation occurred during the month, or on certain days of the month, because spray irrigation in conformity with good engineering practices had not been possible due to weather and/or ground surface conditions.

65. Rockwell also provided DOE with draft letters containing information for DOE to pass on to EPA and CDH regarding whether or not violations had occurred during each month. That draft language typically mirrored the language in the MMR reports Rockwell provided to DOE, i.e. Rockwell stated for the majority of months that there were no violations of the NPDES permit relating to spray irrigation or otherwise concealed the spray irrigation

violations. Rockwell's draft statements were false or fraudulent for the reasons explained above.

66. Rockwell caused DOE to pass along such false or fraudulent statements to EPA and CDH.

67. Rockwell made other false or misleading statements regarding the spray irrigation violations in other documents provided to DOE. For instance, Rockwell made false statements in the NPDES permit renewal process by failing to identify runoff of waste water from spray irrigation as a known potential contamination sources that entered various ponds at Rocky Flats, including Ponds A-4, B-5, and C-2. Rockwell also failed to include any of its 40 knowing criminal violations of the NPDES permit in the self-analyses Rockwell submitted to DOE as a part of the award fee evaluation process.

68. Rockwell's failure to inform DOE that it was violating the NPDES permit, as required by law, as well as its false statements that it had not violated the CWA, among other misrepresentations and omissions, induced and caused DOE to pay Rockwell more for Rockwell's performance than DOE would have paid, had Rockwell told DOE the truth, and to continue to allow Rockwell to perform the contract, whereas, once DOE began to learn the true facts about Rockwell's poor performance, DOE took steps to replace Rockwell with a new contractor (i.e., EG&G).

E. Rockwell's Fraudulent Inducement of Contract Extensions

69. By reason of its concealment and misrepresentation of ES&H violations, Rockwell fraudulently induced and caused DOE to enter into the extensions of the Rocky Flats contract.

70. For example, following the entry of its criminal guilty plea on March 26, 1992, Rockwell submitted to the criminal sentencing court a document styled "Defendant's Sentencing Memorandum."

71. As admitted by Rockwell in Defendant's Sentencing Memorandum, 20
DOE's "Prerenewal Appraisal" of Rockwell's performance during the period October 1, 1984 through June 30, 1987 concluded:

> Waste Management operations at Rocky Flats have been heavily impacted by the Resources Conservation and Recovery Act (RCRA). A direct outgrowth is a tri-party agreement between DOE, the Environmental Protection Agency (EPA), and the State of Colorado which now governs the handling of both hazardous wastes and mixed wastes (low level transuranic wastes combined with hazardous wastes) at Rocky Flats. Rockwell's performance has been in the very good/excellent range.
>
> * * * *
>
> All deadlines required by the Rocky Flats Compliance Agreement were met and RCRA compliance, with approved exceptions [none of which encompassed Rockwell's criminal violations], was achieved.

72. Furthermore, Rockwell specifically acknowledged
that

> This favorable appraisal formed the basis for DOE's renewal of Rockwell's site management contract at Rocky Flats for the five-year period commencing January 1, 1989.

Thus, RCRA compliance was a material reason that DOE renewed the contract with Rockwell at this time (and at others). However, as stated above, Rockwell was not in fact

complying with RCRA and other pertinent environmental laws, regulations, and orders, a fact which Rockwell concealed from DOE, thereby obtaining contract renewal.

F. DOE's Termination of Rockwell's Contract

73. On June 6, 1989, agents of the Federal Bureau of Investigation and EPA raided the Rocky Flats Plant pursuant to a search warrant for evidence of violations of the ES&H criminal laws, regulations, and DOE orders.

74. Following this raid, DOE began to learn about the full extent of Rockwell's violations of the ES&H criminal laws, regulations, and DOE orders, and about Rockwell's related misconduct.

75. Following the raid, because of Rockwell's poor ES&H performance and its violations, DOE determined that Rockwell should no longer be the management and operations contractor for Rocky Flats, and that a new contractor should take over the plant. DOE began consideration of the basis upon which it might terminate Rockwell, and of ways in which a transition to a new contractor could be effectuated without undue hazard and risk, given the highly dangerous nuclear activities carried out at Rocky Flats.

76. Before DOE could reach any final conclusions with respect to these questions, Rockwell filed a lawsuit in the United States District Court for the District of Columbia requesting, inter alia that it be released from its contractual obligations under the Rocky Flats Contract.

77. Following Rockwell's initiation of that lawsuit, Rockwell and DOE agreed that Rockwell's management and operation of Rocky Flats would end on or about December 31, 1989, and be taken over by a new contractor, EG&G, upon that date.

G. Rockwell's False and Fraudulent Claims to DOE

78. By reason of the foregoing conduct, Rockwell knowingly presented, and caused to be presented, to an officer and employee of the United States government false

and fraudulent claims for payment and approval, to wit, its various requests and demands, under its contract and otherwise, for money or property of the United States in the form of payments of award fees and other fees for the management and operation of Rocky Flats during the time periods when Rockwell was violating the ES&H laws, regulations, and DOE orders, failing to disclose other material aspects of its poor ES&H record, and committing other misconduct, as pleaded above, in violation of 31 U.S.C. § 3729(a)(1).

79. Furthermore, by reason of the foregoing conduct, Rockwell knowingly made, used, and caused to be made and used false records and statements to get false and fraudulent claims paid and approved by the government, which false records and statements included, inter alia, the various false and misleading statements, representations, concealments, and omissions described above, in violation of 31 U.S.C. § 3729(a)(2).

80. Rockwell is liable for common law fraud and breach of contract. DOE also paid Rockwell monies under a mistake of fact regarding Rockwell's performance under the contract and compliance with environmental laws. Rockwell also was unjustly enriched by receiving high award fees and other payments under the contract while it was violating criminal environmental laws and otherwise engaging in misconduct while performing the contract.

MONETARY DAMAGES

81. By reason of these false statements and other misconduct by Rockwell, the government suffered monetary damages, and Rockwell was paid as a result of mistakes of fact, and Rockwell was unjustly enriched.

82. The United States suffered monetary damages because the United States paid Rockwell more in award fees and other monies for performing the contract, and incurred more in costs, than DOE otherwise would have paid, had DOE known the truth about Rockwell's poor ES&H performance, and Rockwell's various violations in

ES&H areas. Further, the United States continued to keep Rockwell as contractor at Rocky Flats which it would not have done, had it known the truth.

COUNT ONE

(False Claims Act: 31 U.S.C. § 3729(a)(1) and (2))

83. This is a claim by plaintiff United States and relator Stone against defendants Rockwell, Boeing, and Boeing NAC for treble damages and civil penalties under the False Claims Act, 31 U.S.C. § 3729(a)(1) and (a)(2) for Rockwell's knowingly presenting or causing to be presented to the government false or fraudulent claims for money or property.

84. Plaintiffs incorporate by reference herein the allegations made above in paragraphs 1 through 82, inclusive.

85. By virtue of the acts described above, Rockwell knowingly presented, and caused to be presented, to an officer and employee of the United States government false and fraudulent claims for payment and approval, to wit, its various requests and demands, under its contract and otherwise, for money or property of the United States in the form of payments of award fees and other fees for the management and operation of Rocky Flats during the time periods when Rockwell was violating the ES&H laws, regulations, and orders, and omitting to fully and truthfully inform the United States of other ES&H problems and other misconduct, as pleaded above, in violation of 31 U.S.C. § 3-729(a)(1) and (a)(2).

86. Furthermore, by reason of the foregoing conduct, Rockwell knowingly made, used, and caused to be made and used false records and statements to get false and fraudulent claims paid and approved by the government, which false records and statements included, inter alia the various false and misleading statements, representations, concealments, and omissions described above.

87. By reason of Rockwell's violations of the False Claims Act, the United States was damaged because

it paid more in fees and other monies for the operation of Rocky Flats, than it would have paid had it known the truth.

COUNT TWO

(Common Law Fraud)

88. This is a claim by plaintiff United States against Rockwell, Boeing, and Boeing NAC, for common law fraud.

89. Plaintiff United States incorporates by reference herein the allegations made above in paragraphs 1 through 82, inclusive.

90. Rockwell made false material representations to, and/ or omitted material information which it had a duty to disclose, to the United States, and did so with intent to defraud the United States, with knowledge of their falsity, and/or with reckless disregard for their truth. Rockwell intended that the United States act in reliance upon these representations and/or omissions.

91. The United States did in fact rely upon Rockwell's false and/or fraudulent material representations and omissions, and, as a result, the United States was damaged because it paid more in fees and other monies for the operation of Rocky Flats, than it would have paid had it known the truth.

COUNT THREE

(Breach of Contract)

92. This is a claim by plaintiff United States against Rockwell, Boeing, and Boeing NAC, for breach of contract.

93. Plaintiff United States incorporates by reference herein the allegations made above in paragraphs 1 through 82, inclusive.

94. By virtue of the acts set forth above, Rockwell breached its contract with the United States for the operation of Rocky Flats.

95. By reason of Rockwell's breach of contract, the United States sustained damages.

COUNT FOUR

(Payment By Mistake of Fact)

96. This is a claim by plaintiff United States against Rockwell, Boeing, and Boeing NAC, for payment by mistake of fact.

97. Plaintiff United States incorporates by reference herein the allegations made above in paragraphs 1 through 82, inclusive.

98. The United States made payments to Rockwell under the contract in the mistaken belief that Rockwell was fully performing the contract, complying with all laws (including environmental laws), and properly disclosing any and all violations of such laws. Such payments were made by mistake of fact and were not authorized by law.

99. As a result of such mistaken and unauthorized payments, the United States sustained damages.

COUNT FIVE

(Unjust Enrichment)

100. This is a claim by plaintiff United States against Rockwell, Boeing, and Boeing NAC, for payment by mistake of fact.

101. Plaintiff United States incorporates by reference herein the allegations made above in paragraphs 1 through 82, inclusive.

102. Plaintiff paid to defendant monies by which, as a result of the facts and circumstances stated above, defendant has been unjustly enriched at the expense of the United States.

103. By reason of these payments, plaintiff is entitled to the return of the amount by which defendant has been unjustly enriched.

ADDITIONAL FACTS AND CLAIMS ALLEGED BY RELATOR

104. The relator, James S. Stone, alleges the following additional facts and claim:

105. The DOE orders applicable to Rockwell's management of Rocky Flats included 6430.1 and 6430.1A, entitled "General Design Criteria," 5483.1 and 5483.1A, entitled "Occupational Safety and Health Program for DOE Contractor Employees at Government-Owned Facilities," and 5480.1A, entitled "Environmental Protection, Safety and Health Protection For DOE Operations." These and other DOE Orders were intended, among other things, to ensure that the design and operation of Rocky Flats did not harm the plant employees, the public, or the environment, including by requiring that Rockwell comply with provisions of the Occupational Safety and Health Act ("OSHA").

106. The Rocky Flats' NPDES permit issued in 1981 was based on the condition that the sewage treatment plant ("STP") receive only domestic sanitary waste, cooling tower blowdown, and steam condensate. By the early 1980's, and possibly sooner, Rockwell learned that industrial wastes, in fact, also went to the STP, contrary to the permit.

107. Among other things, Rockwell did not disclose to the government that the "influent" disposed of into the STP contained hazardous wastes. This toxic influent to the STP also impaired the STP's performance. Moreover, as already discussed, effluent from the STP was spray irrigated, contrary to good engineering practices, causing run-off into public waterways.

108. As Rockwell ultimately admitted in the Plea Agreement and Statement of Factual Basis, Rockwell dumped in the STP such industrial wastes as beryllium dust, spent solvents, acetone, methylene chloride, 2-butanone, and wastes containing such toxic materials as cadmium, chromium and mercury. Rockwell pleaded guilty to violating NPDES permits by not reporting to the EPA, as required, all new, different, or increased discharges of pollutants and failing to prevent or minimize the potential for releasing significant amounts of toxic or hazardous substances from Rocky Flats to surface waters. Rockwell also pleaded guilty to violating NPDES permit conditions requiring it to

maintain the STP to achieve compliance with the permit terms and conditions.

109. Both during NPDES permit renewal negotiations over the course of the 1980's and in its Self-Analyses, Rockwell misrepresented to and concealed from the government the full extent of its knowledge about hazardous wastes disposed of in the STP in violation of NPDES permits. By so doing, Rockwell induced DOE to pay Rockwell higher award fees than DOE would have paid had DOE known the truth, and to continue the Rockwell contract.

110. Rockwell also committed serious health and safety transgressions relating to plutonium while it was manager of Rocky Flats, which were not adequately reported to the government, and which were in violation of, among other things, the above-described DOE orders.

111. Among other material misconduct relating to plutonium, Rockwell knowingly caused the accumulation of significant quantities of plutonium and other radioactive materials in building ducts throughout Rocky Flats. The problems associated with such uncontrolled accumulations are several-fold. First, enough plutonium in any one place in a certain configuration may cause a "criticality"--a rapid and uncontrolled release of radiation likely to cause fire, worker exposure and significant damage to safety systems intended to protect the public from plutonium exposure. Second, the presence in the ducts of what is considered one of the most toxic materials known to mankind poses a serious risk to maintenance workers and to workers stationed near the ducts, particularly if the ducts were to leak or rupture. And, the plutonium-contaminated ducts have consistently proved expensive and difficult to clean-up and otherwise remediate -- a particularly glaring problem now that Rocky Flats has ceased operations.

112. Malfunctioning and poorly-maintained "gloveboxes" were partially to blame for the plutonium accumulation. Gloveboxes are protective enclosures into

which workers place their hands when working on the processes involving plutonium, including fabrication of nuclear weapons components and processing plutonium materials. Intended to be under negative pressure, the gloveboxes are connected to the exhaust duct system with an intervening High Efficiency Particulate absorption ("HEPA") filter. The HEPA filter serves to prevent large amounts of plutonium dust from flowing from the gloveboxes into the duct system.

113. Rockwell did not properly maintain the gloveboxes and exhaust systems. For example, clogged HEPA filters were not replaced on an adequate basis. Rockwell exacerbated the maintenance problem by failing to comply with the DOE General Design Criteria Manual applicable to Rocky Flats at the time (DOE Orders 6430 and 6430.1), which required pre-filters in addition to, and ahead of, the HEPA filters, to reduce blockage. Workers were forced to poke holes in the clogged HEPA filters, or sometimes filters were removed altogether contrary to the DOE General Design Criteria Manual, to ensure negative pressure (air flow into the exhaust system and away from the workers). And, dump or release valves, which were supposed to open when negative pressure inside the glovebox fell and allow the air (and plutonium) to escape into the exhaust system, commonly remained partially or wholly open. With the missing, clogged and damaged filters and the open dump valves, plutonium dust flowed relatively unimpeded into the ducts at Rocky Flats. There was no routine, quantitative survey of plutonium accumulation in the duct work. Malfunctioning and poorly-maintained gloveboxes and related systems posed a hazard to workers as well, who depended on such protective devices for their safety.

114. The extent of the plutonium contamination in the ducts and the problems with the gloveboxes and related systems were in violation of contract terms numerous DOE Orders, including 6430, 6430.1, 5483.1, 5483.1A and 5480.1A.

115. The glovebox and exhaust system problems and the possibility of significant plutonium accumulation in the ducts at Rocky Flats were known to Rockwell during the time period that it was manager of Rocky Flats. Yet, Rockwell failed to disclose its knowledge to DOE or do anything about the plutonium-related problems while self-praising its criticality and nuclear safety programs in various Self-Analyses and other statements.

116. Even in 1989 when a comprehensive study of plutonium accumulation was launched, Rockwell misrepresented its knowledge of the problem. For example, in December 1989 discussions over award fees, Rockwell advised the government that the duct survey and study of necessary criticality program reforms conducted by outside consultants was aimed "at a new concern which had never been identified in 40 years [of DOE audits]." And Rockwell management falsely reported to the 1989 study team upon its initial visits that there was no evidence of plutonium accumulation in the ducts.

117. Had the United States been on notice during Rockwell's tenure of the facts regarding plutonium use and accumulation it later learned, it would not have allowed Rockwell to remain as contractor. At the very least, Rockwell's endangerment of its workers and the public by exposure to plutonium, if known to the United States earlier, would not have justified the substantial award fees Rockwell received for years. The government was also damaged by having valuable materials which belong to the government lost or rendered unrecoverable by Rockwell's misconduct.

118. Rockwell's beryllium machining shop in Building 444, in which the toxic metal was used to make weapons components, provides another example of Rockwell's lax attention to worker health that went substantially unreported to the Government.

119. After DOE became aware in 1984 of a case of the severe lung disease berylliosis (caused by beryllium

exposure) in a former Rocky Flats worker - the first of many diagnosed to date -it ordered Rockwell to investigate health conditions in the machine shop. The team appointed to head this investigation found extensive beryllium contamination throughout the shop, poor industrial hygiene practices (including workers not wearing respirators), a monitoring program that drastically undermeasured workers' exposure and an inadequate ventilation system. Levels of beryllium exposure in the shop were improperly above the OSHA standard. An independent consulting firm, OccuSafe Inc., verified these problems. Over the next several years, Rockwell, in conjunction with OccuSafe, was supposed to fix each of these problems.

120. Rockwell knew of the dangerous conditions in the beryllium machine shop prior to 1984, and made misrepresentations to DOE thereafter relating to such conditions or the correction of same. Such misrepresentations caused DOE to award higher award fees than it would have otherwise paid and to continue to renew Rockwell's contract at Rocky Flats.

COUNT SIX

(False Claims Act: 31 U.S.C. § 3729(a)(1))

121. This is a claim by relator Stone for treble damages and civil penalties under the False Claims Act, 31 U.S.C. § 3729(a)(1) for Rockwell's knowingly presenting or causing to be presented to the Government false or fraudulent claims for money or property.

122. Plaintiff Stone incorporates by reference herein the allegations made above in paragraphs 1 through 82, and 104 through 120, inclusive.

123. By virtue of the acts described above, Rockwell knowingly presented, or caused to be presented, to the government false or fraudulent claims for money or property, and used false and fraudulent statements to get claims paid and approved by the government. By reason of Rockwell's violations, relator alleges the United States has been damaged in an amount to be proven at trial in excess of

$50 million.

PRAYER

WHEREFORE, plaintiff United States and relator Stone pray for judgment against the defendants, jointly and severally, as follows:

A. On Count I, under the False Claims Act, for treble the damages sustained by the United States, which also include investigative costs, and which will be proven at trial, plus civil penalties as are allowable by law in the amount of $5,000 to $10,000 per violation, post judgment interest, and attorneys fees and costs;

Plaintiff United States prays for judgment against defendants, jointly and severally, as follows:

B. On Count II, common law fraud, judgment against defendant for the damages sustained by the United States which will be proven at trial, and for pre judgment and post-judgment interest, and costs;

C. On Count III, breach of contract, against defendants in the amount equal to the damages suffered by the United States, plus pre judgment and post judgment interest, and costs;

D. On Count IV, payment under mistake, for the sums mistakenly paid by the United States, which will be proven at trial, and for pre judgment and post judgment interest, and costs;

E. On Count V, unjust enrichment, for the sums by which Rockwell has been unjustly enriched, which will be proven at trial. plus pre judgment and post-judgment interest, and costs;

Plaintiff Stone prays for judgment against defendants, jointly and severally, as follows:

F. On Count VI, under the False Claims Act, for treble the damages sustained by the United States, which also include investigative costs, and which will be proven at trial, plus civil penalties as are allowable by law in the amount of $5,000 to $10,000 per violation, post judgment interest, and attorneys' fees and costs; and

Plaintiffs United States and Stone pray for:

G. Such other relief as this Court may deem just and proper, together with interest and costs.

As to Counts I through V:

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Assistant Attorney General

HENRY L. SOLANO
United States Attorney

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Attorney for James S. Stone

Dated: December 20, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-M-1154

UNITED STATES OF AMERICA
ex rel. James S. Stone,

Plaintiff,

v.

ROCKWELL INTERNATIONAL
CORPORATION,

Defendant.

ANSWER TO AMENDED COMPLAINT

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* * *

10. The claims asserted by Mr. Stone in the Amended Complaint are barred under 31 U.S.C. § 3730(e)(4) because they are based upon publicly available information and Mr. Stone is not the "original source" of such information.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA ex rel. JAMES S. STONE,	)	
Plaintiff,	)	89 M 1154
vs.	)	
ROCKWELL INTERNATIONAL CORPORATION,	)	
Defendant.	)	

PRELIMINARY PRETRIAL CONFERENCE
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, a U.S. District Judge for the District of Colorado, beginning at 2:00 p.m. on the 26th day of September, 1997, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

MR. KOENIGS: And I believe a case in some circuit down south has ruled that you still have to do an original source analysis, even if the government intervenes, to determine whether or not the qui tam plaintiff is allowed to recover attorney's fees.

THE COURT: But that's secondary to the trial anyway.

MR. KOENIGS: It surely is.

THE COURT: I mean, that would be an issue that I would deal with if there's a verdict in favor of the plaintiffs.

* * *

THE COURT: Okay. And then you also have some matters here relating to the part of this case, and Mr. Stone's participation, but I'm not sure how significant that is now with the government having joined, I mean, except for this one claim in which the government has not joined, and which we do have to worry about how we're going to deal with that, as discussed before. Apart from that, though, what real difference does it make? The government's here, and I don't-you know, you've even got a challenge to the constitutionality of the statute.

MR. KOENIGS: Right. The statute is still fully applicable, but as you have pointed out, only as to this remaining unadopted claim, which is plutonium in the ducts. And also, Your Honor, my understanding of the law is that there's a case holding that not withstanding if the government intervenes, there's a statutory provision which allows a plaintiff to recover attorney's fees.

United States District Court

DISTRICT OF COLORADO

In the Matter of the Search of * * *	
The Rocky Flats Plant U.S. Department of Energy Rockwell International Corporation Highway 93 Golden, Colorado 80402	APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT CASE NUMBER

I Jon S. Lipsky being duly sworn depose and say:

* * *

8.12. During 1988, Pond 207A was being drained and Building 778 was being used to mix the wastes from Pond 207A with concrete to form "pond crete." However, due to an inadequate waste-concrete mixture, some of the blocks disintegrated and the clean-up of the 207 solar ponds was, and remains halted. Since clean-up activities have allegedly ceased, Ponds 207A, 207B and 207C should not be in use. As of November 8, 1988, RCRA's interim status regulations also require all surface impoundments to have two or more liners and a leachate collection system in order to continue receiving hazardous wastes. See 40 C.F.R. 265.221. Solar Ponds 207A, 207B and 207C do not have the required liners or leachate collection system.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA
ex rel. JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL CORPORATION, THE BOEING CORP., and BOEING NORTH AMERICAN, INC.

Defendant.

SCHEDULING ORDER

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* * *

(c) Joint meetings with clients regarding settlement.

Subsequent to Government intervention, no settlement discussions have occurred, and no meetings have been scheduled.

VII. Discovery Limitations, Deadlines and Scheduling:

A. Fact Discovery Limitations and Deadlines:

1. Depositions. The parties agree that the cutoff date for fact depositions shall be March 19, 1998. The parties agree that each side shall be permitted to take up to 45 post-government intervention depositions without leave of court. The parties

state that while they intend to make every effort to remain within this deposition limit, it may be possible that despite best efforts some additional depositions may be necessary. In such instance, they would seek leave of court.

2. Interrogatories. The parties agree that the cutoff date for serving interrogatories shall be February 15, 1998. The parties also agree that each side be limited to 25 post-government intervention interrogatories, including subparts. The Government has withdrawn all but 18 post-government intervention interrogatories served in this action, to which defendants agree to answer on or before December 30, 1997. With regard to the 7 remainig available interrogatories, the Government will be responsible for serving any such additional interrogatories onn behalf of plaintiffs. Defendants agree to answer any such interrogatories on or before 30 days after service. Defendants have withdrawn all but 4 post-government intervention interrogatories served in this action, and has 21 remaining available interrogatories. The Government agrees to answer any such interrogatories on or before 30 days after service.

3. Admissions. The parties agree that each side shall be limited to 250 requests for admissions, including subparts, without leave of court. The cutoff date for service of admissions shall be M arch 19, 1998.

4. Documents The cutoff for service of document requests shall be March 19, 1998.

B. Expert Discovery Limitations and Deadlines:

1. Expert Designation. The parties shall simultaneously designate experts and prove

opposing counsel with the information identified in Rule 26(a)(2) on or before February 9, 1998.

2. Rebuttal Experts. The parties shall simultaneously designate any rebuttal experts and provide opposing counsel with the information identified in Rule 26(a0(2) on or before March 30, 1998.

3. Deposition of Experts. Depositions of experts may begin on or after February 19, 1998, and the cutoff date for depositions of experts shall be April 30, 1998.

C. Other Discovery Deadlines:

1. Exchange of Final Wtinesses and Exhibits. Final lists of witnesses and exhibits under Rule 26(a)(3) are due April 9, 1998. The parties shall file their respective objections to the lists of witnesses and exhibits under Rule 26(a)(3) on or before April 30, 1998.

2. Dispositive Motions. Leave of court must be requested to file any motion for summary judgment. The deadline for filing any motion for summary judgment motion is April 9, 1998.

D. Proposed Trial Date.

The parties request that the Court consider scheduling trial in early June 1998.

VII. Other Matters Warranting the Court's Attention:

Defendants state that the following additional issues or matters await the Court's decision:

On March 17, 1997, defendants filed a Motion for Partial Summary Judgment seeking judgment as a matter of law on two of plaintiff United States' five claims for relief—those alleging unjust enrichment and payment by mistake of fact. On April 9, 1997, plaintiff United States filed its response to defendants' motion, and on May 29, 1997, defendants filed a reply brief on the motion.

WITH RESPECT TO DISCOVERY DISPUTES, PARTIES MUST COMPLY WITH D.C. COLO. L. 7.1. PARTIES OPPOSING A DISCOVERY MOTION SHALL HAVE 11 DAYS IN WHICH TO FILE A RESPONSIVE BRIEF. NO REPLY BRIEFS WILL BE ACCEPTED WITHOUT LEAVE OF COURT. DISCOVERY MOTIONS OR BRIEFS RELATING THERETO SHALL NOT EXCEED 10 PAGES IN LENGTH.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA
ex rel. JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION and BOEING
NORTH AMERICAN, INC.

Defendant.

STIPULATION

Plaintiffs United States of America and James S. Stone, and defendants Rockwell International Corporation and Boeing North American, Inc. (collectively, the "parties"), by and through their attorneys, agree as follows:

1. The parties shall not introduce evidence, comment or otherwise make arguments concerning Mr. Stone's status as relator or right to relief in this case except as set forth in the Juror Questionnaire provided to the parties by the Court at the conference held on February 4, 1998.

2. Any proposed jury instructions that conflict with the above are hereby withdrawn.

3. Nothing in this Stipulation shall affect the rights or arguments of any party as to Mr. Stone's entitlement to relief as a result of any verdict for the plaintiffs in this case.

Dated: February 17, 1998

Respectfully submitted,
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[CLERK, U.S. DISTRICT COURT]
[DISTRICT OF COLORADO]
[FILED]
[9/21/98]
[JAMES R. MANSPEAKER, CLERK]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-M-1154

UNITED STATES OF AMERICA *ex rel.* James S. Stone, and UNITED STATES OF AMERICA,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL CO., *et al.*,

Defendants.

DEFENDANTS' MEMORANDUM OF LAW SUPPORTING THEIR PROPOSED JURY INSTRUCTIONS RELATING TO FALSE CLAIMS ACT ELEMENTS OF LIABILITY AND DAMAGES

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* * *

consolidated and expanded version of those instructions should be provided to the jury *before* any evidence is presented.

A preliminary instruction is particularly appropriate in this case, because Mr. Stone is not included on plaintiffs' trial witness list and plaintiffs' counsel have confirmed in writing that he will not be called to testify at trial. Thus, the best method for explaining to the jury the parties to the litigation as well as Mr. Stone's involvement will be through a factual instruction at the beginning of trial. Attached hereto as Exhibit A is Rockwell's proposed preliminary jury instruction, which is based in part upon Judge Carrigan's August 8, 1991 Order (copy attached as Ex. B) dismissing on collateral estoppel grounds Mr. Stone's claim against Rockwell alleging retaliation for whistle-blowing under the FCA.

B. **The 1986 FCA Amendments May Require Two Versions of FCA Instructions.**

The FCA was substantially amended by Congress in October 1986. The more significant substantive changes included: (1) lowering the level of defendant's knowledge required to establish a violation, 31 U.S.C. § 3729(b);[21] (2) lowering the plaintiff's burden of proof from clear and convincing (see *United States v. Ueber*, 299 F.2d 310, 314-15 (6th Cir. 1962)) to a preponderance of the evidence, 31 U.S.C. § 3731(c); (3) increasing the civil penalty from $2,000 to between $5,000 and $10,000 per "claim," *id.* § 3729(a); (4) providing for treble rather than double actual, non-consequential damages, *id.*; and (5) permitting a prevailing *qui tam* plaintiff to recover attorney fees even if the government intervenes. *Id.* § 3730(d)(1).

None of substantives changes to the FCA – including

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[21] Under the pre-1986 FCA, a finding of "actual knowledge" was required in the Tenth Circuit to impose liability. *United States v. Fleming*, 336 F.2d 475, 480 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965). As amended, either deliberate ignorance or reckless disregard of the truth is now sufficient to satisfy the scienter requirement.

those set forth above – can be applied retroactively to conduct that occurred in this case before the amendments were made effective on October 27, 1986. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S. Ct. 1871, 1876-79 (1997). *See, e.g., United States v. TDC Management Corp.*, 24 F.3d 292, 298 (D.C. Cir. 1994) (treble damages and civil penalty increases permitted by the amended FCA cannot be applied retroactively); *United States v. Murphy*, 937 F.2d 1032, 1038 (6th Cir. 1991) (the amended FCA's expansion of the scienter requirement beyond "actual knowledge" cannot be applied retroactively).

Despite repeated requests by Rockwell and their obligation to do so under Fed. R. Civ. P 26(a)(1)(C), plaintiffs have never firmly identified the specific "claims" for which they will contend at trial that Rockwell is liable for a civil penalty under the FCA. Plaintiffs initially asserted that "[w]e estimate that a civil penalty should be assessed for each six month award fee period within the time period of 10/01/86 to 09/30/89, and for each statement and concealment detailed in the government's response to Rockwell's Interrogatory No. 38 in the Court of Federal Claims case." *See* Plaintiff United States' Disclosures Pursuant to Federal Rule of Civil Procedure 26(a)(1) served on January 15, 1997, at 7 (excerpts attached as Ex. C).

Apparently recognizing that there were hundreds of alleged false statements and concealments contained in the government's 81-page response to Rockwell's Interrogatory No. 38 in the Court of Federal Claims case, plaintiffs modified their position on the availability of penalties in an amended filing served in this case on September 25, 1997: "We estimate that Rockwell is potentially eligible for a civil penalty for each affected award fee period, and for each request for payment or draw down on the letter of credit relating to any of the sums paid to Rockwell in the above damage calculations." See Plaintiff United States' First

Amendment to Disclosures Pursuant to Federal Rule of Civil Procedure 26(a)(1), at 5-6 (excerpts attached as Ex. D).[22] The "damage calculations" referenced by plaintiffs in the "First Amendment to Disclosures" related to award fees starting with the six-month period ending March 31, 1987 and to pondcrete/saltcrete operations costs between "1987 and 1989." *Id.* at 3-4. Thus, only post-amendment FCA damages were asserted in the "First Amendment to Disclosures."

Notably, plaintiffs have not tendered any pre-FCA amendment jury instructions. Based on this fact, as well as plaintiffs' disclosures discussed above, Rockwell currently believes that all of the disputed conduct for which plaintiffs seek to hold Rockwell liable occurred *after* the October 27, 1986 effective date of the FCA amendments. Accordingly, Rockwell has not tendered proposed jury instructions relating to the pre-amendment version of the FCA.

If plaintiffs intend to seek damages for conduct prior to October 27, 1986, it will be necessary for the jury to receive a second version of instructions relating to the pre-amendment FCA. In order for the Court (and Rockwell) to determine whether pre-amendment FCA instructions will be needed, Rockwell respectfully requests that the Court direct plaintiffs to file promptly an itemization of the specific "claims" for which they will *actually* seek at trial to impose liability for civil penalties under the FCA.

Are plaintiffs seeking civil penalties only for (1) specified award fee periods, and (2) specific requests for payment or draw downs on the letter of credit relating to sums paid by the government relating to pondcrete/saltcrete production? If so, for which specific six-month award fee periods, and

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[22] Rockwell paid expenses for operating the Rocky Flats plant directly out of a government-owned checking account, which was funded by a government letter of credit.

which specific requests for payment or draw downs on the letter of credit, are plaintiffs seeking civil penalties? If not, for what other claims will plaintiffs actually seek to recover civil penalties at trial? To be useful, plaintiffs' itemization must include (1) a designation of each "claim" for which plaintiffs will seek to hold Rockwell liable for civil penalties, and (2) a description of the evidence (by reference to trial exhibit numbers) documenting the making of each alleged "claim" by Rockwell. Such an itemization should have been provided by plaintiffs months ago; it is now crucial that the itemization be made promptly for purposes of determining the need for pre-amendment FCA jury instructions.

C. General Elements of Liability Under the FCA.

Plaintiffs have asserted claims under Subsections (a)(1) and (a)(2) of the FCA. *See* 31 U.S.C. § 3729(a)(1)-(2). In order to establish a violation of Subsection (a)(1), plaintiffs bear the burden of proving that Rockwell submitted to the government a claim for payment that was knowingly false or fraudulent in some material respect. *See* Def. Instr. 12. To show liability under Subsection (a)(2), the Tenth Circuit recently stated that:

> [A] [plaintiff] must demonstrate (1) a 'claim' was presented to the government by the defendant . . . (2) the claim was 'false or fraudulent,' (3) the defendant presented the claim knowing it was `false or fraudulent," and (4) the defendant made or used a false statement which the defendant knew to be false, and which was *casually connected to the false claim.*"

United States ex rel. Aakhus v. Dyncorp, Inc., 136 F.3d 676, 682 (10th Cir. 1998) (emphasis added). *See also United States ex rel. Lamers v. City of Green Bay*, 998 F. Supp. 971, 986 (E.D. Wis. 1998) (Subsection (a)(2) "must involve the

production or use of a false statement or record *on behalf of a false claim*" for liability to be imposed) (emphasis supplied by the court); *BMY-Combat Sys. v. United States*, 38 Fed. Cl. 109, 126 (1997) (liability under

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA ex rel.,	)	
Plaintiff,	)	
vs.	)	89 M 1154
ROCKWELL INTERNATIONAL CORPORATION, et al.,	)	
Defendant.	)	

STATUS CONFERENCE
TRANSCRIPT OF PROCEEDINGS

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

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* * *

* * *

[44] your indulgence. I have two questions, though, one is what years, and this is important for the jury instructions because there was a change in the FCA in 1986. So if Mr. Kolar could address what years these claims are for? And, secondly, I just want to make sure that there are no other claims than these monthly and annual--possibly monthly, certainly annual, that might be asserted as claims under the FCA, if I may, Your Honor, the questions we've been asking for a long time.

MR. KOLAR: Let me address the second question first, because I guess the way--the meaning of a claim is one of the issues we do address in the jury instruction briefs, and I think we have a disagreement with them over the interpretation or understanding of the first prong under the statute, Subsection 3729(a)(1), that says --

THE COURT: Well, this is why we're doing jury instructions early.

MR. KOLAR: Right. I think it's --

THE COURT: What is this amendment?

MR. KOLAR: All right, I'll address the first issue first.

THE COURT: Yeah.

MR. KOLAR: The amendment was the change to the False Claims Act in October of 1986, which among other things, changed the scienter standard. It standardized, if you will, [45] the scienter standard all over the country. Up

until that time, there were disparate circuit court decisions, and Congress came in and said knowing means actual knowledge, deliberate ignorance, reckless disregard. That was one of the changes. Congress specifically stated that specific intent to defraud was not required. So there was --

THE COURT: What had the Tenth Circuit said before that amendment?

MR. KOLAR: The Tenth Circuit had said in a case called Fleminct versus United States, that it was actually knowledge of falsity. The problem with it was that courts in—and I don't think the court addressed it beyond that. And courts in other circuits in the country by that point in time had interpreted what actual knowledge of falsity --

THE COURT: Well, we're going to apply Tenth Circuit law, aren't we?

MR. KOLAR: Absolutely.

THE COURT: Okay.

MR. KOLAR: But I'm just saying there was a great deal of confusion I would say in the case law.

THE COURT: Well, now, do we have in this case some pre-amendment and some post-amendment?

MR. KOLAR: We are not going to argue that costs prior to the change in the statute are false costs in this case. I don't think that -- the change in the statute was in -- took [46] effect in October of 1986.

THE COURT: Okay.

MR. KOLAR: The timing of when we say the false conduct and fraudulent conduct in regard to pondcrete started was in early '87.

THE COURT: So the '86 act is the one --

MR. KOLAR: So the '86 act, in my view, does not apply.

THE COURT: Does not apply?

MR. KOLAR: I'm sorry, I misspoke.

THE COURT: Does apply.

MR. KOLAR: It's been a long day. I misspoke. It does apply.

THE COURT: Yes.

MR. KOLAR: The pre-1986 act does not apply.

THE COURT: Does not. Okay, so we're working with the standards established by Congress in the 1986 act.

MR. KOLAR: That's correct.

THE COURT: That helps.

MR. KOENIGS: That does help. And then the last issue of whether there are any other claims as to which the government will seek these fairly substantial penalties, other than the annual and possibly monthly vouchers.

MR. KOLAR: The issue -- the other thing that we think is subject to penalties in the statute is false statements. This gets into the difference between A(1) and A(2) in 3729,

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA
ex rel. JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION and BOEING -
NORTH AMERICAN, INC.

Defendant.

MR. STONE'S RESPONSE TO DEFENDANTS' MEMORANDUM ON PROPOSED JURY INSTRUCTIONS PERTAINING TO MR. STONE'S ROLE AS RELATOR

Pursuant to the discussions at the September 25, 1998 status conference, plaintiff James S. Stone, relator, by his counsel, respectfully submits this response to defendants' discussion regarding Mr. Stone's role as relator in "Defendants' Memorandum of Law Supporting Their Proposed Jury Instructions Relating to False Claims Act Elements of Liability and Damages," dated September 21, 1998.

Preliminary Statement

On September 21, 1998, the parties submitted to the Court their respective memoranda of law on the proposed jury instructions on the False Claims Act. In its memorandum, Rockwell also raised two issues relating to Mr. Stone's status as relator in this case. First, Rockwell argues that what it calls "the *qui tam* jurisdictional defense" -- which was rejected by the Court in February 1994 --

should be revisited after trial in the event plaintiffs prevail. And second, Rockwell suggests that this Court should instruct the jury regarding (i) Mr. Stone's state court wrongful discharge case and (ii) the statutory provisions relating to Mr. Stone's percentage share of the recovery in this case.

As to the first, Mr. Stone agrees with Rockwell that any issues Rockwell might seek to raise regarding the so-called "*qui tam* jurisdictional defense" (and we believe there are none) should be deferred until after trial. As we explain below, the Court's subject matter jurisdiction has been resolved by two prior rulings of the Court -- the first when it denied Rockwell's motion to dismiss on "original source" grounds prior to government intervention, and the second when it granted the government's motion to intervene in the case. Thus, this Court plainly has jurisdiction over this case and the "original source" provision simply is not now in the case. In any event, because no triable issues are presented by Rockwell's so-called jurisdictional defense, this topic should be addressed, if at all, following trial, which is precisely what the parties had agreed prior to the July 6 trial date.

Furthermore, Rockwell's proposed jury instructions relating to Mr. Stone's role as relator clearly are inappropriate, because they have nothing whatsoever to do with any of the issues that the jury will need to decide in this case. Specifically, Rockwell's proposed "Preliminary Instruction [No. 1-A] Regarding the Parties and Stone's Role as a Relator" obviously seeks to prejudice the jury against rendering a large damages verdict by informing the jury that Mr. Stone, by statute, may receive up to 25 % of the recovery. However, the jury should not be permitted to consider the manner by which any verdict it renders will be divided among the plaintiffs (as that division is outside its province), but rather must decide the actual amount of damages that resulted from Rockwell's false claims. Put another way, because Rockwell will be liable for the full

judgment no matter how much of it Mr. Stone receives, there simply is no issue for the jury to decide on the topic and thus instructing the jury on what the FCA statute provides is clearly inappropriate.

Likewise, Rockwell's attempt to inform the jury that Mr. Stone's retaliation claim was dismissed by this Court -- on the basis of collateral estoppel due to the dismissal of his state court action that rested on the at-will employment doctrine of Colorado law (which has nothing to do with this case) -- is another attempt improperly to prejudice the jury against plaintiffs on an issue that does not go to the merits of the-claims that will be submitted to the jury in this case. Indeed, if Rockwell were entitled to the instruction it seeks (and it is not), then plaintiffs are entitled to have the jury told that (i) the Court found Mr. Stone to be an original source and accordingly denied Rockwell's motion to dismiss on that ground and (ii) the fact that the government intervened in this case demonstrates even the more its meritworthiness.

In short, the jury's role is to decide the factual issues relating to plaintiffs' claims and Rockwell's defenses, and not any issues relating to how the damages are divided by statute between the plaintiffs. Toward that end, the Court may explain Mr. Stone's role in the case as relator without (as Rockwell seeks) prejudicing the jury to award a lesser amount of damages to plaintiffs.

Statement of Facts

In November 1992, Rockwell deposed Mr. Stone over the course of four days. Relying on that testimony, on December 12, 1992, Rockwell filed a motion to dismiss this action for lack of subject matter jurisdiction, arguing that the allegations in this case were based on publicly disclosed information and contending that Mr. Stone was not an "original source" of that information. The parties briefed this issue extensively and, following oral argument, on February 2, 1994, Judge Carrigan denied Rockwell's motion, in a written opinion in which the Court found that Mr. Stone

was an original source of the information upon which the allegations in this action are based and that this Court accordingly had jurisdiction over the action. Specifically, Judge Carrigan ruled:

> [T]here is evidence that Mr. Stone had direct and independent knowledge that Rockwell's compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments... .
>
> As a result, I conclude that Mr. Stone possessed direct and independent knowledge of the information on which the allegations [of this action] are based....

Opinion at 4-5. Upon Rockwell's request, Judge Carrigan certified this ruling for interlocutory appeal to the Tenth Circuit. On November 16, 1994, the Tenth Circuit declined to hear the appeal, and this action has proceeded through today without Rockwell ever again seeking reconsideration of Judge Carrigan's findings.

Over a year after the Tenth Circuit rejected Rockwell's appeal, on November 14, 1995, the United States moved to intervene in this case pursuant to 31 U.S.C. § 3730(c)(3) on the basis of information provided by Mr. Stone in this action, as well as information obtained by the government in its (now stayed) litigation with Rockwell in the Court of Federal Claims. This Court granted the government's motion to intervene on November 19, 1996. United States ex rel. Stone v. Rockwell Int'l Corp., 950 F. Supp. 1046, 1049 (D. Colo. 1996). At the same time, this Court denied Rockwell's motion "to enforce" the plea agreement by which Rockwell had sought to prevent the United States from intervening on the asserted ground that such intervention violated Rockwell's criminal plea agreement. In a direct appeal taken by Rockwell in the criminal case, the Tenth Circuit affirmed this Court's decision on government intervention. United States v. Rockwell Int'l Corp., 124

F.3d 1194, 1201 (10th Cir. 1997). In light of these rulings, there can be no question that this Court has subject matter jurisdiction over this action.

In April 1998 -- for ~~the first time~~ since November 1992 -- Rockwell requested an additional deposition of Mr. Stone. Because Rockwell had deposed Mr. Stone for four full days already, and because Rockwell also was beyond its 45-deposition limit, Mr. Stone objected to this deposition absent Rockwell demonstrating a compelling reason for the deposition. In response, Rockwell stated ~~that~~ the purpose of this deposition was to obtain information relating to Mr. Stone's status as an "original source" of the allegations in this case -- the same subject about which Mr. Stone had been deposed for four days. While Mr. Stone took the position (which we reiterate here) that the original source issue was fully disposed of by Judge Carrigan's decision, counsel for Mr. Stone and Rockwell agreed that the original source provision was not an issue to be litigated at the trial of this action and should be addressed, if at all, after the conclusion of the trial. Thus, in accordance with this agreement, plaintiffs did not submit any jury instructions on the subject nor did we discuss it in our corresponding memorandum of law.[1]

Discussion

I.
THE ASSERTED *QUI TAM* "JURISDICTIONAL" DEFENSE

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[1] Communications between counsel for Rockwell and counsel for Mr. Stone on the original source provision and the deposition of Mr. Stone, including the agreement to defer this matter until after trial, are documented in a series of correspondence exchanged by counsel. Pursuant to the Court's prior instruction, we have not attached copies of this correspondence but will make them available upon the Court's request.

A. The "Original Source" Provision Has Been Decided and Is Not An Issue For Trial

The False Claims Act grants this Court subject matter jurisdiction over actions that are based upon the public disclosure of allegations or transactions if (1) the person bringing the action is an original source of the information, or (2) the suit is brought by the government. 31 U.S.C. § 3730(e)(4)(A). In this case, both of these alternatives have been satisfied by court order.

First, in December 1992, Rockwell sought to dismiss this action under § 3730(e)(4)(A) on the asserted ground that Mr. Stone was not an original source of the information upon which this action is based. Following extensive briefing and argument, Judge Carrigan rejected Rockwell's argument, and properly asserted jurisdiction over this action by finding that Mr. Stone was an original source of the information upon which this action is based. Opinion at 3-5. See also United States ex rel. Durcholz v. FKW Inc., 997 F. Supp. 1159, 1164-67 (S.D. Ind. 1998) (finding relator to be original source on motion to dismiss, court asserted jurisdiction over FCA action); United States ex rel. Long v. SCS Bus. & Technical Inst., 999 F. Supp. 78, 86-89 (D.C. 1998) (same).

The Court also properly asserted subject matter jurisdiction under the FCA through, and by virtue of, the government's intervention in this case in November 1996. See United States ex rel. Stone v. Rockwell Int'l Corp., 950 F. Supp. 1046, 1049 (D. Colo. 1996) (permitting government to intervene as a party-plaintiff in this-case). Indeed, any argument that Rockwell might have had regarding the Court's jurisdiction over this action following Judge Carrigan's decision on original source has been mooted by the government's intervention. See United States ex rel. Merena v. Smithkline Beecham Corp., Nos. Civ.A. 93-5974, Civ.A. 95-6953, Civ.A. 95-6551, 1998 WL 166256 at *15 E.D.

Pa. Apr. 8, 1998) (holding that government intervention moots any subject matter jurisdiction question); see also County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (matter is moot when issues presented are no longer live or the parties lack a legally cognizable interest in the outcome); Phelps v. Hamilton, 122 F.3d 1309, 1325-26 (10th Cir. 1997) (prior court decision finding statute unconstitutional moots current challenge to application of the statute); Southern Utah Wilderness Alliance v. Smith, 110 F.3d 724, 727-29 (10th Cir. 1997) (where relief sought by plaintiff has been provided, claim was moot).

Because jurisdiction has been established (twice), there is no issue relating to the original source provision requiring disposition at trial. Any argument that Rockwell might raise with this provision (and we believe there is none) should be made after the trial of this action. In fact, while we dispute that there is any remaining issue to be decided at all, Rockwell at least agrees that application of this provision is "for the Court -- not a jury -- to decide." Rockwell Mem. at 31; see also United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 551 n.1 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993).

Thus, Mr. Stone submits that there are no viable issues concerning subject matter jurisdiction or the original source provision. In any event, if any such issues may still be raised by Rockwell, they should be addressed following the conclusion of trial, consistently with the agreement previously reached by the parties.

II.

ROCKWELL'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 1-A SHOULD BE REJECTED

Rockwell's proposed preliminary instruction regarding the role of Mr. Stone as relator should be rejected because it is irrelevant to the issues that the jury is to decide and plainly is designed to unfairly prejudice the jury against plaintiffs.

While plaintiffs do not dispute the usefulness of

preliminary instructions to introduce the jury to the parties in this case (and we have proposed a few of our own), Rockwell's proposal goes too far. It reads as follows, with the offensive language italicized:

> I will instruct you at the conclusion of the evidence on the elements that the plaintiffs, or the United States, must prove under each claim. For now, you should know that the False Claims Act allows a private citizen, known as a "Relator," to bring an action on behalf of the United States government against any person or entity who is alleged to have knowingly submitted a false or fraudulent claim for payment to the government.
>
> In this case, the Relator is Mr. Stone, who was employed by defendant from November 10, 1980 until March 17, 1986. Mr. Stone filed this lawsuit in July 1989 alleging claims for violation of the False Claim [sic] Act *and for retaliation for whistle-blowing against defendant. Mr. Stone's retaliation claim was dismissed by Order of this Court dated August 8, 1991 because that claim had been decided against Mr. Stone in a separate state court action that found his discharge by defendant in March 1986 to have been as a result of a reduction in force.* The government subsequently intervened in this case and joined Mr. Stone in his claim under the False Claims Act relating to pondcrete, saltcrete and spray irrigation.
>
> *If a False Claims Act violation is proven in this case, the Court may award Mr. Stone up to 25% of the damages that may be recovered, and any remainder will be paid to the United States government.*

First, Mr. Stone's state court action -- and the dismissal of his retaliation claim on collateral estoppel grounds -- is

entirely irrelevant to the claims to be decided by the jury in this case. By way of background, Mr. Stone had filed a state court action relating to Rockwell's termination of Mr. Stone's employment. That case was decided against Mr. Stone on the grounds that under Colorado law his employment was at will and therefore terminable at any time, and that he was laid off due to a reduction of force. Based on that finding, Judge Carrigan granted Rockwell's motion to dismiss Mr. Stone's retaliation claim in his complaint in this Court, without making any new findings. See United States ex rel. Stone v. Rockwell Int'l Corp., No 89-C-1154 (Aug. 3, 1991). Because these issues have nothing to do with the FCA claims to be presented to this jury on Rockwell's conduct, there is no reason to instruct the jury about them.

Moreover, Rockwell's proposed instruction is completely one-sided. While Rockwell seeks to discuss Mr. Stone's state court action -- apparently to have the jury conclude (illogically) that his FCA claims lack merit -- Rockwell omits any mention of certain motions decided in this case which plaintiffs would argue demonstrate the merits of their claims -- including the denial of Rockwell's motion to dismiss the case on original source grounds and the Court's grant of the government's motion to intervene in Mr. Stone's suit. Rockwell cannot have it both ways.

Second, Rockwell's statement That "the Court may award Mr. Stone up to 25% of the damages that may be recovered, and any remainder will be paid to the United States government" also must be rejected because such an instruction clearly is intended to prejudice and inflame the jury against plaintiffs. If the jury were told that Mr. Stone may receive 25% of the damages awarded in this case, the jury inappropriately may conclude that Congress was wrong in setting that percentage and might adjust its damages verdict as a result. Just as juries are not told about other statutory provisions that are enacted by Congress for other public policy reasons -- such as trebling, civil penalties and

recovery of attorneys' fees -- the jury should not be told about the relator's share provision of the FCA.. See, e.g., HBE Leasing Corp. v. Frank, 22 F.3d 41, 46-47 (2d Cir. 1994) (district court properly precluded "defendants' counsel from parading RICO's treble damages and attorney's fees provisions before the jury"); Standard Indus., Inc. v. Mobil Oil Corp., 475 F.2d 220, 223 (10th Cir.) ("matters of trebling, costs and attorney's fees were 'no part of the jury's function'"), cert. denied, 414 U.S. 829 (1973).

The bottom line is that the jury's role is to decide what the actual damages are without considering how much Rockwell in fact must pay at the end of the day and how much the government and Mr. Stone each will receive. Thus, submission of instructions or evidence to the jury on the relator's share provision (as Rockwell proposes) would only confuse deliberations regarding those areas directly within the jury's purview: Rockwell's liability and the amount of damages recoverable by plaintiffs under the FCA.

Conclusion

For the foregoing reasons, Rockwell's proposed jury instruction No. 1-A should be rejected to the extent it discusses Mr. Stone's share of the recovery and his retaliation and wrongful discharge claims. In addition, Mr. Stone submits that Rockwell should not be permitted to relitigate the "original source" issue but, in any event, the Court should rule that any such relitigation should be deferred until after trial.

Dated: October 8, 1998

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA
ex rel. JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION and BOEING
NORTH AMERICAN, INC.

Defendant.

FINAL PRETRIAL ORDER

I. Date and Appearances

A pretrial conference in the above case was held on January 28, 1999.

Appearing for the parties were:

John A. Kolar, Esq.
Commercial Litigation Branch, Civil Division
U.S. Department of Justice
Patrick Henry Building
601 D Street, N.W.
Washington, D.C. 20004

Counsel for the United States of America

* * *

B. Defenses of Defendants:

Defendants deny the allegations set forth in plaintiffs' statement of claims, and states that it fairly disclosed to

DOE, EPA, DOJ, and other government agencies all material problems at the Rocky Flats Plant involving environmental, health and safety matters. In addition, defendants assert that: (1) plaintiffs' claims are barred in whole or in part by the applicable statutes of limitations; (2) plaintiffs' claims are barred in whole or in part by the doctrines of waiver, estoppel and laches; (3) the damages sought by plaintiffs are barred because the United States failed to mitigate its damages, if any; (4) plaintiffs' claims are barred because facts relating to the allegations of fraud set forth therein were the subject of independent investigation, evaluation, acquiescence and/or approval by the United States; (5) the claims asserted by the United States are barred by a release and covenant not to sue by the United States; (6) the claims asserted by the United States are barred because they are brought in breach of promises and representations that the United States made to Rockwell in order to induce Rockwell's guilty plea in the criminal action captioned United States of America v. Rockwell International Corporation, Case No. 92-CR-107 (D. Colo.); (7) the claim asserted by the United States for breach of contract is barred, in whole or in part, because Rockwell's performance was (a) rendered impracticable; (b) rendered impossible; (c) prevented or substantially interfered with by the government; and/or (d) induced by the government; (8) the claims asserted by the United States for payment by mistake of fact and unjust enrichment are barred because the relevant relationship between Rockwell and the United States was governed by a contract or contracts; (9) the claims asserted by Mr. Stone are barred under 31 U.S.C. § 3730(e)(4) because they are based upon publicly available information and Mr. Stone is not the "original source" of such information; (10) the claims asserted by Mr. Stone are barred because they are based on evidence or information which the United States had in its

possession at the time this action was commenced; (11) the claims asserted by Mr. Stone are barred because the *qui tam* provisions of the False Claims Act as amended violate several provisions of the United States Constitution, including the separation of powers doctrine, the appointments clause of Article II, section 2, and the case or controversy requirement of Article III; (12) any judgment against defendants should be diminished, in whole or in part, to an amount which represents defendants' assigned degree of negligence, fault or responsibility (if any) pursuant to C.R.S. § 13-21-111.5, or other applicable law; and (13) the claims asserted by Mr. Stone in Count 6 are barred, in the event the United States is deemed a proper party to this action, because the United States has not joined Mr. Stone in asserting those claims.

Defendants' description of certain information supporting their "government knowledge" related defenses is attached at Tab E.

Defendants object to plaintiffs' above description of certain damage claims because, *inter alia*, plaintiffs have not previously disclosed such damage claims. Defendants will file a motion on this issue.

There are no third-party defendants in this action. Rockwell has not asserted any counterclaims, cross-claims or third-party claims.

Plaintiffs' non-stipulated contentions for this section are included with plaintiffs' addendum attached at Tab A. Defendants' non-stipulated contentions for this section are included with defendants' addendum attached at Tab B.

* * *

PLAINTIFFS' STATEMENT OF CLAIMS

Plaintiffs set forth below a statement of the facts establishing their entitlement to a judgment in their favor for liability and damages. Plaintiffs have not attempted to set forth every event, act, and communication with respect to which they intend to present evidence at trial. Plaintiffs have not attempted to fully summarize the contents of depositions and/or witness affidavits available to both sides. Nor have plaintiffs summarized or reiterated the text of every documentary exhibit upon which they will rely at trial, such documents having been already provided to defendants. Nor have plaintiffs reiterated information regarding the events described below which plaintiffs have obtained through Rockwell's own written discovery responses.

When and if plaintiffs' counsel and investigators interview third party witnesses (including without limitation former Rockwell and government employees) between the date of this Pretrial Order and the date of trial, plaintiffs may obtain additional information regarding their claims. Plaintiffs reserve the right to present at trial any and all such information obtained from third party witnesses after the date of the Pretrial Order.

A. Background

1. Rockwell and the United States, acting through a predecessor agency to the Department of Energy ("DOE"), to wit, the Atomic Energy Commission ("AEC"), entered into Contract No. AT(29-2)-3533, effective June 30, 1975, later redesignated Contract No. DE-AC04- 76DP03533, for the operation by Rockwell of the Rocky Flats nuclear weapons plant.

2. This Contract was subsequently renewed and amended a number of times. By Mod 005 to Contract No.

DE-AC04-76DP03.533, the contract was converted from a cost-plus-fixed-fee type to a cost-plus-award-fee type ("CPAF"), effective February 1, 1979. Effective January 1, 1986, Rockwell and DOE entered into Mod M087 of Contract DE-AC04-76DP03533, which governed Rockwell's performance from January 1, 1986 through December 31, 1988. Effective January 1, 1989, Rockwell and DOE entered into Mod M124 of Contract DE-AC04-76DP03533, which was to govern Rockwell's performance commencing January 1, 1989. EG&G replaced Rockwell as the M & O contractor, effective January 1, 1990.

3. In connection with Mod M087, Rockwell had sought a five-year extension from January 1, 1986 through December 31, 1990. However, cognizant DOE headquarters officials concluded that certain aspects of Rockwell's past performance warranted only a three-year extention, with authority for an additional one-year extension (to enable DOE to recompete the Contract, if necessary). Thus, throughout the period from January 1, 1986 through March 3, 1988, when the DOE's Undersecretary granted Rockwell a further five-year extension, Rockwell was aware that the quality of its performance was being closely scrutinized by DOE to determine whether Rockwell should receive any further Contract extension.

4. Throughout the period from January 1, 1986 through December 31, 1989, the pertinent provisions of Rockwell's Contract with DOE required Rockwell to:

- to manage, operate, and maintain the Rocky Flats Plant in accordance with the other terms and conditions set forth in the Contract, and in accordance with directions and instructions of the Contracting Officer;

to manage, operate, and maintain the Rocky Flats Plant in accordance with programs approved by the Contracting Officer;

- to use its best judgment, skill and care in all matters

pertaining to the performance of the Contract;
- to comply with all applicable environmental, safety and health regulations and requirements (including reporting requirements) of the Department of Energy;
- to procure all necessary permits and licenses and abide by all applicable laws, regulations, and ordinances of the United States and Colorado; and
- to have its managerial personnel acted toward DOE in good faith and without willful misconduct.

5. Throughout the period from January 1, 1987 through December 31, 1989, the pertinent provisions of Rockwell's Contract with DOE defined the "allowable costs" which Rockwell was permitted to charge to the government as those costs that were necessary and incident to the performance of the Contract in accordance with its terms. The Contract expressly stated that certain costs were deemed unallowable costs which Rockwell was not permitted to charge to the government. Unallowable costs included the costs of defending actions or proposed actions of the United States, and the costs arising from any action, in which Rockwell, or its agents or employees, was liable of committing fraud, submitting false certifications, or other similar conduct.

B. Pondcrete And Saltcrete

1. Plaintiff United States contends that Rockwell breached the foregoing duties in regard to "pondcrete," "saltcrete," and "spray irrigation," and plaintiffs United States and James S. Stone contend further that Rockwell committed a violation of the False Claims Act and common law fraud in relation to these activities. The government contends Rockwell was unjustly enriched as a result, and received payments of government funds by mistake.

2. One of the laws by which Rockwell was contractually bound to comply was the Resource Conservation and Recovery Act of 1976 ("RCRA"), Title 42, U.S.C. §§ 6901 et

seq., as amended. RCRA prohibits the treatment, storage and disposal of hazardous wastes without a permit or interim status. In order to obtain a RCRA permit or interim status, a facility must submit a RCRA Part A permit application and subsequently a Part B application, which must be approved by federal and/or state authorities. During the time period relevant to plaintiffs' claims in this case, in order to treat, store or dispose of hazardous wastes at an interim status facility, RCRA required compliance with rules and regulations promulgated at Title 6, Colorado Code of Regulations 1007-3, Colorado Hazardous Waste Regulations ("6 C.C.R. 1007-3"), Parts 265 and 270.

3. RCRA permits and interim status are more than mere licenses. They impose conditions on a facility's hazardous waste activities. Owners and operators of hazardous waste facilities are required to ensure that all hazardous wastes are appropriately handled and that all RCRA requirements are satisfied.

4. As more particularly described below, Rockwell did not comply with RCRA; to the contrary, Rockwell materially breached the contract provisions, including by committing felony violations of RCRA in the course of its pondcrete and saltcrete operations (see Plea Agreement, Count 1), and by breaching the other duties set forth above, thereby resulting in DOE's incurrence of award fee and base fee costs that DOE would not have paid, had Rockwell told DOE the truth; costs of manufacturing pondcrete and saltcrete that DOE would not have deemed an allowable cost, had Rockwell told DOE the truth; and approximately $150,000,000 of damages to repair pondcrete and saltcrete manufactured by Rockwell. Furthermore, Rockwell concealed information from DOE, and made false, fraudulent, and misleading written and oral statements, and communicated distortions and half-truths, to DOE regarding the pondcrete and saltcrete operations, their

conformity with RCRA, and the quality of the pondcrete and saltcrete Rockwell was producing. Rockwell thereby caused DOE to pay more in award fees and base fees to Rockwell, more in pondcrete and saltcrete manufacturing and repair costs to Rockwell, and more in pondcrete and saltcrete repair costs to others, than DOE would have had to pay, had Rockwell told the truth to DOE.

5. "Pondcrete" is a mixture of cement and sludge from a surface impoundment at Rocky Flats known as solar evaporation pond 207A, shaped in large rectangular blocks. At all material times, solar pond sludge was treated, and pondcrete was manufactured, in or about Building 788 at Rocky Flats.

6. "Saltcrete" is a mixture of cement, salts and salt brine from liquid waste treatment processes in Building 374, shaped in large rectangular blocks. At all material times, salts and salt brine were treated, and saltcrete was manufactured, in or about Building 374 at Rocky Flats.

7. Rockwell has admitted that "pondcrete" and "saltcrete" were hazardous wastes within the meaning of RCRA, 42 U.S.C. §6903(5), and 6 C.C.R. 1007-3, Part 261.

8. Rockwell was required to comply with RCRA interim status storage requirements in storing pondcrete and saltcrete.

9. Colorado Hazardous Waste Regulations, 6 C.C.R. 1007-3, § 265.31 required Rockwell to maintain and operate its interim status facilities in such a way as to "minimize the possibility of ... any unplanned sudden or non-sudden release of hazardous wastes or hazardous waste constituents to air, soil, or water which could threaten human health or the environment."

10. 6 C.C.R. 1007-3, § 265.173 required Rockwell to handle and store pondcrete and saltcrete containers in a manner that would prevent them from rupturing or leaking.

11. 6 C.C.R. 1007-3, §265.15(c) required Rockwell to

"remedy any deterioration or malfunction of equipment or structures ... on a schedule which ensure[d] that the problem [did] not lead to an environmental or human health hazard. Where a hazard [was] imminent or ha[d] already occurred," Rockwell was required to take immediate remedial action.

12. Beginning in approximately October 1986, Rockwell knowingly stored pondcrete and saltcrete blocks on an outdoor pad known as the "750 pad." Rockwell subsequently knowingly stored pondcrete and saltcrete blocks on the "904 pad."

13. During or about the same period, Rockwell knew that a substantial number of pondcrete and saltcrete blocks were not in fact solid. Pondcrete was often a sludge-like or semiliquid material. Saltcrete was prone to expansion and crystallization.

14. During or about the same period, Rockwell was aware that pondcrete and saltcrete constituents were leaching and being released from the pondcrete and saltcrete material onto the 750 and 904 pads.

15. During or about the same period, Rockwell was also aware that pondcrete and saltcrete constituents were running off the 750 and 904 Pads, and failed to correct this condition.

16. Prior to May 23, 1988, Rockwell led DOE to believe through a pattern of false, fraudulent, and misleading written and oral statements, and distortions and half-truths, and concealments and omissions, that the pondcrete and saltcrete blocks stored on the Pads were solid, cement-like, concrete-like, stable, nearly incompressible monolithic blocks (hereinafter "solid"), and that they met applicable laws and regulations governing their handling and storage at Rocky Flats, as well as laws and regulations governing their shipment to, and burial at, the Nevada Test Site ("NTS").

17. Prior to May 23, 1988, Rockwell falsely represented to DOE that the blocks were solid, and that their storage on the Pads should be permitted pursuant to RCRA, and 6 C.C.R. 1007-3. Rockwell did not include pertinent information in such disclosures to DOE that would have informed DOE that the pondcrete and saltcrete were not being properly made or stored, or that a substantial number of blocks were not in fact solid. Instead, Rockwell omitted and concealed such information from DOE.

18. Prior to May 23, 1988, Rockwell told DOE that it was meeting the schedule and requirements of the 1986 Compliance Agreement (described more fully below) in its removal of the solar pond sludge and manufacturing of pondcrete. Rockwell did not include pertinent information in such disclosures to DOE that would have informed DOE that the pondcrete and saltcrete were not being properly made or stored, or that a substantial number of blocks were not in fact solid. Instead, Rockwell omitted and concealed such information from DOE.

19. Prior to May 23, 1988, Rockwell did not disclose to DOE that: (a) a substantial number of pondcrete and saltcrete blocks were not in fact solid; (b) the pondcrete was often a sludge-like or semi-liquid material; (c) pondcrete and saltcrete constituents were leaching and/or being released from the pondcrete blocks onto the pads, and into the environment; (d) Rockwell's processes were inadequate to uniformly ensure that the blocks that Rockwell manufactured were in fact solid; (e) the pondcrete manufacturing equipment often was malfunctioning in a way that substantially impeded Rockwell's ability to produce an acceptable waste form; and (f) the inspection processes for pondcrete were inadequate to detect defective blocks before the blocks were placed on the pads. Rockwell, by its pattern of false, fraudulent, and misleading written and oral statements, and distortions and half-truths, led DOE to

believe the contrary.

20. Had Rockwell informed DOE of the foregoing facts, DOE would have directed Rockwell to cease the production of pondcrete and saltcrete, after which time Rockwell would not have been paid to make pondcrete and saltcrete. Had Rockwell informed DOE of the foregoing facts, DOE would not have incurred approximately $150,000,000 in pondcrete and saltcrete repair costs.

21. It was not until after the spill of May 23, 1988 that DOE began to become aware of those aspects of the pondcrete problems described above. However, following May 23, 1988, Rockwell continued to conceal from, and misrepresent to, DOE (and others including the public and Congress) the fact that Rockwell had become aware of pondcrete problems long before May 23, 1988. Rockwell continued to downplay problems, including the full extent of those problems. Instead of disclosing the truth about its knowledge, Rockwell created the false and misleading impression that it was ignorant of the problems until May 23, 1988.

22. Rockwell continued to misrepresent its knowledge about, and the scope of the pondcrete problems, during the time that it was applying for, and negotiating, the renewal of its Contract with DOE for the contract term commencing January 1, 1989.

23. After the May 23, 1988 spill, Rockwell generated many documents, including an Unusual Occurrence Report ("UOR"), in which Rockwell recognized that the pondcrete spill of May 23, 1988 was a result of an incorrect cement/sludge ratio used in its pondcrete operations, as well as due to inadequate process controls and inadequate inspection procedures.

24. More specifically, the facts supporting plaintiffs' claims relating to pondcrete and saltcrete are as follows:

25. In DOE Order 5820.2, entitled "Radioactive Waste

Management," effective February 6, 1984, DOE established policies and guidelines for the management of radioactive wastes by its contractors. Other orders governing performance by DOE contractors in the Environment, Safety & Health (ES&H) area were implemented, and/or updated or amended, by DOE from time to time.

26. By 1985, Rockwell was aware that mixed wastes, and specifically, the wastes giving rise to ponderete and saltcrete, were becoming subject to RCRA regulation. For example, in an August 22, 1985 memorandum, the Department of Energy's Albuquerque Operations Office ("DOE-AL" or "DOE-ALO") advised DOE's Rocky Flats Area Office ("DOE-RFAO") as follows:

> Attached are three documents which outline the various hazardous waste management deadlines imposed on DOE and EPA by the 1984 RCRA amendments. They may assist you in preparing for the deadlines. The automatic provisions (those which did or will go into effect automatically) were codified on July 15, 1985 (50 FR 28702). Please review the compliance status of your facility (management of both hazardous and mixed wastes) and advise this office by September 17, 1985 of any major issues which may arise as a result of the amendment deadlines."

This memorandum was forwarded by DOE-RFAO to Rockwell officials at Rocky Flats by memorandum dated August 28, 1985. Rockwell responded by memorandum dated September 17, 1985 as follows:

> Rockwell International has identified numerous waste types which present disposal problems due to the unavailability of adequate disposal facilities within the DOE complex. Most problematic are those radioactively-contaminated, hazardous wastes

> subject to RCRA authority. ... Disposal problems are anticipated for the following radioactively-contaminated, hazardous waste streams if they are ultimately determined to be RCRA controlled: ... Evaporator salts and solar pond sludge."

27. In order to satisfy its contractual obligations to properly make, store and ship pondcrete and saltcrete, and to continue to receive payments under its contract, Rockwell submitted applications and related regulatory materials to the United States and certain state agencies, and was required to fully and truthfully disclose to the government matters relating to its pondcrete and saltcrete operations, including compliance with pertinent regulations.

28. During 1985 or earlier, Rockwell had begun the development of a process to mix evaporator salts with cement to form saltcrete, and to mix solar pond sludge with cement to form pondcrete, as a means of disposing of these radioactive mixed wastes in conformity with RCRA and other requirements. Rockwell and DOE contemplated that these materials would be sent to DOE's Nevada Test Site ("NTS") for disposal by burial in the desert.

29. DOE's Nevada Operations Office, which oversaw NTS, had certain requirements that a generator of wastes for burial was required to meet before NTS was allowed to accept such wastes. These were set forth in NVO-185. Among other things, NVO-185 required certain package strength requirements. The purpose of these strength requirements was to support NTS's practice of stacking waste containers on top of one another—sometimes three high or more—in the "pit" where the wastes were disposed.

30. On May 14, 1985, Rockwell sought a waiver of NTS's requirement to use plywood boxes for the burial of pondcrete and saltcrete, seeking instead NTS's permission to utilize "Tri-wall Corrugated Fiberboard Boxes." (This

request followed a number of similar requests by Rockwell for such a waiver dating back to 1979.) Tri-walls were boxes composed of three layers of heavy-duty cardboard with metal banding. Beginning May 14, 1985 and continuing through May 23, 1988, Rockwell repeatedly represented to DOE that the cardboard boxes were not necessary to contain the pondcrete and saltcrete wastes due to the hardness of these waste forms and the inability of the hazardous constituents to migrate from the stable concrete matrix.

31. In addition to Rockwell's representation to DOE that the strength of the pondcrete and saltcrete blocks would be "nearly incompressible," Rockwell constantly conveyed to DOE officials that pondcrete and saltcrete would be rock-hard by repeatedly characterizing these materials in numerous documents and oral statements to as "cemented monoliths," or "concrete monoliths."

32. In approximately July 1985, NTS officials discovered one or more saltcrete blocks that were in a "mushy" condition. NTS immediately reported this to Rockwell, and received assurances from Rockwell's Manager of Waste Operations that this was an anomaly and would not be allowed to happen again.

33. Shortly before July 9, 1985, an employee of the Department of Energy's Albuquerque Operations Office ("DOE-AL" or "DOE-ALO") with responsibility for low-level and mixed waste management issues at Rocky Flats visited the site to observe the pondcrete and saltcrete operations. He believed that Rockwell had made excellent progress in installing, testing, and implementing the pondcrete and saltcrete processes and that a good quality solidified waste form was being produced. This employee prepared a memorandum so stating which was sent to DOE's Acting Area Manager of Rocky Flats.

34. This DOE-ALO employee made a return visit on

September 26-27, 1985, and again received an impression that the processes were working and that Rockwell was producing a satisfactory waste form at that time, a satisfactory waste form being one that was "nearly incompressible." From this time and continuing through May 23, 1988, this employee was never informed by Rockwell that any of the blocks in storage at Rocky Flats were unsatisfactory because they were of a lesser hardness once they had been allowed time to fully cure.

35. On July 31, 1986, DOE, EPA, and the Colorado Department of Health ("CDH") entered into a Compliance Agreement to govern the handling and storage of radioactive mixed wastes at Rocky Flats, including the sludge in the Rocky Flats solar ponds. The parties agreed that the regulatory framework for compliance for the Plant's radioactive mixed waste was 40 C.F.R. Parts 260-271, but, once EPA authorized the State of Colorado to regulate radioactive mixed wastes under RCRA, such radioactive mixed wastes would be governed by the Colorado hazardous waste regulations. DOE agreed to provide closure plans to EPA and CDH for the Rocky Flats solar ponds by August 29, 1986.

36. Section 4(d) of the Compliance Agreement provided that DOE had engaged Rockwell to perform management services at Rocky Flats including activities required to meet DOE's obligations under the Compliance Agreement. On July 31, 1986, DOE's Area Manager advised Rockwell's Plant Manager that meeting the Compliance Agreement obligations was crucial to the continuing operation of Rocky Flats and that DOE was counting on him to take personal responsibility for meeting the commitments and deadlines in the Agreement. (PX 1162) The Compliance Agreement was a program approved by the Contracting Officer, with which Rockwell was contractually obligated to comply.

37. On August 29, 1986, Rockwell submitted to EPA and

CDH a closure plan for the solar ponds. This plan provided that the "sludges in Pond 207-A will be solidified to form pondcrete which will be transported to and disposed of at the Nevada Test Site." (p. 19) The plan further stated that removal of the sludge had begun in June 1985 and would be completed by March 1988."

38. During the fall of 1986, Rockwell hired a company called Chem-Nuclear to review its pondcrete operations. Chem-Nuclear issued a report to Rockwell.

39. Rockwell represented to DOE on October 3, 1986 that "our support of the activities [required by the Compliance Agreement] has been outstanding."

40. On October 9, 1986, Rockwell stated that Rocky Flats had to stop shipping pondcrete and saltcrete to the Nevada Test Site after testing revealed the presence of EPA-listed hazardous constituents in these "cemented waste forms." Rockwell further stated that on-site storage alternatives were being evaluated to house the "cemented product" until appropriate disposal facilities became available. Rockwell represented that "[t]he storage alternative selected will meet legal requirements for such sites." Rockwell also represented that the storage of this material onsite "in a cemented form presents no hazard to the public or the environment." These statements were false, and Rockwell had a duty to correct them, once Rockwell was aware that there was pondcrete and saltcrete in storage that was leaking, leaching, and of less than a "nearly incompressible" solidity.

41. On October 28, 1986, Rockwell represented to DOE that "Rocky Flats complies with the regulations, policies, and criteria as stated in: NVO-185, DOE Order 5820.2," and other DOE orders. Rockwell also represented that as part of its Compliance Agreement duties, Rockwell was ensuring that low-level wastes were being stored in compliance with these regulations. These statements were false, and

Rockwell had a duty to correct them, once Rockwell was aware that there was pondcrete and saltcrete in storage that was leaking, leaching, and of less than a "nearly incompressible" solidity.

42. During the fall of 1986, Rockwell began to knowingly place defective pondcrete blocks into storage on the 750 pad.

43. In November 1986, DOE's Area Manager at Rocky Flats, Earl Whiteman, informed Robert L. Duprey of EPA that the purpose of the triwall boxes was solely to act as a form until the cement was cured. Whiteman further stated that, once cured, the box was not necessary to contain the waste. Whiteman made these statements based on information supplied to DOE by Rockwell and/or upon Rockwell's omissions to disclose information to DOE.

44. On November 13, 1986, in DOE's Award Fee evaluation of Rockwell for the period April 1, 1986 through September 30, 1986, DOE gave Rockwell a "noteworthy achievement" based on its belief that "[s]chedules of the Compliance . . . have been met through an extraordinary effort. High quality work on an extremely compressed timescale has been produced."

45. During the fall of 1986, Rockwell was actively seeking to have DOE extend its Contract for the management and operation of Rocky Flats. On November 19, 1986, Rockwell submitted to DOE its Contract Renewal Report. Therein, Rockwell stated to DOE that it would "assure that all waste forms are stored in a safe, secure manner" was false, and Rockwell had a duty to correct this statement, once Rockwell was aware that there was pondcrete and saltcrete in storage that was leaking, leaching, and insolid.

46. During the winter of 1986, Rockwell replaced its then pondcrete foreman, Norman Fryback, with Ron Teel. Teel increased pondcrete production rates in part by, among other things, reducing the amount of cement added to the

blocks. Following the May 23, 1988 spill, Rockwell acknowledged that this reduced cement-to-sludge ratio was a major contributor to the existence of insufficiently solid pondcrete blocks on the storage pads.

47. While Teel was foreman, Rockwell's pondcrete operators detected insolid and/or leaking boxes of pondcrete on the pads. Sometimes the pondcrete operators spilled boxes that were being transported by forklift for storage on the pad resulting in the spillage of mushy and/or semi-liquid pondcrete onto the pad. The operators sometimes brought bad boxes (i.e., boxes containing waste forms that were defective) of pondcrete back to Building 788 to dispose of or destroy them and/or to mix in more cement or other substances to harden the boxes.

48. Effective January 1, 1987, DOE and Rockwell amended the Contract to expressly provide that Rockwell would bear any costs arising from acts of fraud and/or false statements by any of its agents or employees in connection with the operation of Rocky Flats. This amendment was later invoked by DOE's Area Manager in January 1988 to deny Rockwell's request, when Rockwell sought reimbursement for defense costs in a false claims lawsuit filed by a former Rockwell employee against the company related to activities at Rocky Flats.

49. Rockwell falsely represented to DOE on January 5, 1987 that it had in place a procedure whereby, when a pondcrete or saltcrete waste package was rejected for a major defect (e.g., a waste form nonconformance), Rockwell's Quality Engineering department would conduct an investigation to prevent recurrence of the problem. This was a false statement, inasmuch as Rockwell never implemented such a procedure with respect to pondcrete or saltcrete.

50. On January 15, 1987, Rockwell took credit in its Waste Management Status Report to DOE covering

December 1986 for an increased rate of pondcrete production.

51. On January 29, 1987, CDH approved the RCRA interim status storage of pondcrete and saltcrete in two storage areas at Rocky Flats, including the 750 pad, conditioned, in part, upon Rockwell's conducting sampling of run-off from the 750 pad prior to its discharge.

52. In a Liquid Waste Treatment Facilities Assessment Report in February 1987, Rockwell acknowledged the applicability of the Colorado Hazardous Waste Regulations, and various other regulatory requirements and DOE orders, to the treatment and storage of radioactive mixed wastes at Rocky Flats. The CDH requirements, found at 6 CCR 1007-3 required, among other things, that hazardous waste facilities be maintained and operated in such a manner as to minimize the possibility of any unplanned release of hazardous waste constituents into the environment, and containers holding hazardous wastes not be stored or handled in a manner that might cause them to rupture or leak. Rockwell stated in the Liquid Waste Treatment Facilities Assessment Report that it was following these hazardous waste regulations in regard to saltcrete and pondcrete.

53. In this Liquid Waste Treatment Facilities Assessment Report, Rockwell falsely represented that pondcrete and saltcrete were "being stored at [Rocky Flats] conforming to all RCRA requirements."

54. On February 26, 1987, in its Waste Management Status Report to DOE for the preceding month, Rockwell touted the number of pondcrete blocks it had produced that month. Rockwell also stated to DOE that the "concentration of sludge being cemented in the pug-mill remains at 21% with the use of the hydrogrind pump ...."

55. On March 1, 1987, Rockwell falsely represented to DOE that "[p]ond-creting was selected since the basic

technology has been used and proven to effective, since the plant has experience with the process and since pondcreting meets the requirements of the Nevada Test Site for solidification of radioactive wastes." This statement was false, and Rockwell had a duty to correct it, once Rockwell was aware that there was pondcrete and saltcrete in storage that was leaking, leaching, and of less than a "nearly incompressible" solidity. This statement also was misleading because it did not contain a full disclosure of the problems Rockwell was encountering with the pondcreting process.

56. In March 1987, as a result of the run-off sampling directed by CDH, a Rockwell employee found evidence of leaching from the pondcrete blocks on the 750 pad, and reported this to his manager. However, Rockwell did not report this to DOE.

57. On March 23, 1987, Rockwell told DOE that "[p]roduction of pond crete [sic] waste boxes continues to exceed the established goals." This statement appeared in Rockwell's Waste Management Status Report covering February 1987.

58. Rockwell's claim for its award fee for FY 87-1 was false or fraudulent, because Rockwell knowingly used false or fraudulent statements to get it paid and approved.

59. In May 1, 1987, Rockwell again found leaking and insolid boxes of pondcrete on the 750 pad, and leaking saltcrete in Building 788.

60. During June 1987, Rockwell's pondcrete operators, conducting RCRA inspections on the 750 pad, found evidence of leaking from the pondcrete containers.

61. On June 4, 1987, Rockwell falsely represented to DOE in a draft letter Rockwell prepared for DOE to send to CDH that there was an inability of the hazardous constituents in pondcrete to migrate from "the stable concrete matrix," and Rockwell further falsely stated to

DOE that "our present storage arrangements are adequate for short term protection against the elements."

62. In its self-analysis to DOE dated June 23, 1987, Rockwell falsely and misleadingly stated: "All compliance agreement dates have been and are being met."

63. Throughout the summer and fall of 1987, Rockwell's pondcrete operators, conducting RCRA inspections on the 750 pad, found evidence of leaking from the pondcrete containers.

64. On July 6, 1987, Rockwell falsely and misleadingly stated to DOE that "[p]roduction of pondcrete boxes continued to exceed the established goals." The statement was made in Rockwell's Waste Management Report covering May 1987, the month in which Rockwell's inspector had found leaking and insolid pondcrete on the 750 pad and leaking saltcrete in Building 750.

65. On August 4, 1987, Rockwell falsely and misleadingly told DOE that "[t]he Solar Pond Cleanout operation continues to exceed the established goals although maintenance downtime has increased slightly." Rockwell disclosed minor processing problems to DOE in this document, its Waste Management Status Report for June 1987, but did not inform DOE that it was finding leaking, leaching, and insolid pondcrete blocks on the pad and leaking saltcrete in Building 750, which facts placed Rockwell on notice that, absent corrections (which Rockwell did not implement until after the May 23, 1988 spill) its pondcrete and saltcrete processing operations were seriously flawed, inasmuch as they were turning out blocks that were not, and would not, harden to the necessary solidity.

66. In early August 1987, Rockwell's Waste Operations personnel conducted DOE-RFAO employee Tod Anderson on a tour of the 750 pad. They directed Anderson to a group of pondcrete boxes that had been stored on the pad the

longest and told him it was a representative sample. Rockwell knew this statement was false and misleading, inasmuch as it had reduced the amount of cement in the newer boxes, thereby increasing the likelihood that newer pondcrete blocks would be defective. Anderson touched the material in a box shown him by Rockwell personnel and found that it was hard like concrete.

67. On August 19, 1987, Rockwell falsely and fraudulently represented to DOE that

> "The majority of the mixed waste now accumulating on-site in storage is stored in stable form as concrete blocks (saltcrete or pondcrete)."
>
> "These waste forms ... are meeting all RCRA waste storage requirements. Weekly inspections of the waste storage areas are conducted to preclude environmental releases."
>
> "No leaching of hazardous constituents from pondcrete has been identified."
>
> "No response action is necessary for [pondcrete or saltcrete]. All areas have waste management being conducted in full compliance with all applicable rules and regulations."

68. During September 1987, Rockwell's pondcrete operators, conducting RCRA inspections on the 750 pad, found evidence of leaking from the pondcrete containers.

69. In a Waste Management Status Report submitted to DOE on September 3, 1987 (covering July 1987), Rockwell falsely and fraudulently told DOE: "The Solar Pond Cleanout operation continues to exceed the established goals." The statement went on to describe minor problems with the operation and stated: "Maintenance has provided improved support to complete many of the repairs," thereby misleadingly representing that the only problems known to

Rockwell with regard to the pondcrete and saltcrete operations were minor ones, and that Rockwell was immediately resolving all such problems.

70. In a RCRA/CERCLA Program Status September 9, 1987, Rockwell continued to mislead DOE regarding the quality of the blocks resulting from the pondcrete and saltcrete processes by advising DOE that these blocks were "cemented," and by failing to inform DOE that it had detected insolid, leaking and leaching pondcrete in the storage areas.

71. Around this time, Rockwell's management considered switching to plywood boxes to store newly poured pondcrete boxes. Rockwell's Manager of Waste Operations recommended that, since Rockwell was close to cleaning out Pond 207A, Rockwell stay the course by continuing to use triwall boxes. Rockwell's President, Dominic Sanchini, accepted this recommendation and determined that Rockwell would continue with triwalls for new pondcrete.

72. On September 23, 1987, Rockwell stated to DOE in its self-appraisal: "Rockwell's six-month self-appraisal provides ample demonstration of its progress in meeting a lengthy list of FY87 second half CPAF goals and objectives ... The recent establishment of a RCRA/CERCLA Program is a clear expression of Rockwell's serious intent to be responsive to waste management requirements at Rocky Flats." This statement was false and misleading, given Rockwell's nondisclosure of the existence of leaking, leaching, and insolid pondcrete on the pads.

73. On September 30, 1987, in its Waste Management Status Report covering August 1987, Rockwell falsely and misleadingly told DOE: "The Solar Pond Cleanout operation continues to exceed the established goals."

74. Rockwell's claim for its award fee for FY 87-2 was false or fraudulent, because Rockwell knowingly used false

or fraudulent statements to get it paid and approved.

75. Rockwell's claim for costs for FY 87 was false or fraudulent, because Rockwell knowingly included costs for defective pondcrete, and because Rockwell knowingly used false or fraudulent statements to get this claim paid or approved.

76. During October 1987, Rockwell's pondcrete operators, conducting RCRA inspections on the 750 pad, found evidence of leaking from the pondcrete containers.

77. During November 1987, Rockwell's pondcrete operators, conducting RCRA inspections on the 750 pad, found evidence of leaking from the pondcrete containers.

78. On November 23, 1987, Rockwell falsely and fraudulently stated to DOE that switching to plywood boxes to store newly poured pondcrete was unnecessary, because these waste blocks were "noncompressible."

79. Rockwell again falsely represented to DOE in November 1987 that it had in place a procedure whereby, when a pondcrete or saltcrete waste package was rejected for a major defect (waste form nonconformance), Rockwell's Quality Engineering department would conduct an investigation to prevent recurrence of the problem.

80. On December 15, 1987, Rockwell submitted a RCRA Part B Operating Permit Application that falsely stated:

> "Radioactive mixed waste materials at Rocky Flats are identified, characterized, handled and disposed in a manner which provides for safety of personnel, facilities, and the environment, and which meets the requirements of the Resource Conservation and Recovery Act (RCRA)."
>
> "Solar pond sludge and water are mixed with Portland cement and packaged in fiberboard tri-wall boxes according to Rocky Flats procedures. These packages are frequently checked to assure a

complete solidification of the sludge."

81. In a December 23, 1987 six-month self-analysis, Rockwell falsely and fraudulently stated to DOE: "All RCRA Compliance Agreement requirements and schedules are being met."

82. On January 28, 1988, Rockwell falsely and fraudulently informed DOE: "Rocky Flats currently has in storage 13,000 Tri-wall corrugated fibreboard boxes of solidified blocks of saltcrete and pondcrete which are considered low level mixed waste. Repackaging these in wooden boxes would provide a one time cost impact of $1,500,000 and a continuing additional cost of $120,000 per year. This seems unwarranted considering the noncompressible, stable nature of these waste forms."

83. In February 1988, Rockwell falsely and fraudulently represented to DOE that

> "No response action is necessary for the [pondcrete and saltcrete]. All areas have waste management being conducted in full compliance with all applicable rules and regulations."
>
> "No leaching of hazardous constituents from pondcrete has been identified via environmental sampling surveillance."

84. On February 17, 1988, DOE headquarters procurement officials recommended to DOE's Undersecretary that Rockwell's contract be extended for the contract term commencing January 1, 1989, based in part upon their belief that Rockwell was complying with RCRA and with the Compliance Agreement. The report recommending this action stated in pertinent part:

> "All deadlines required by the Rocky Flats Compliance Agreement were met and the Resource Conservation and Recovery Act compliance, with

approved exceptions, was achieved."

"In July 1986, DOE signed a Compliance Agreement with the Environmental Protection Agency, and the Colorado Department of Health which committed DOE and Rockwell to an extremely aggressive environmental monitoring and remedial action program. Rockwell has met or exceeded all Compliance Agreement requirements in an outstanding manner."

These were false statements which Rockwell caused to be made. The Undersecretary approved the contract extension in March 1988.

85. On February 29, 1988, Rockwell responded to NTS audit findings by falsely and fraudulently telling DOE: "The triple-wall boxes in the lower layers have buckled due to the void space at the top of each package and the prolonged storage." This report was misleading, inasmuch as it suggested that problems with pondcrete were limited to damaged tri-wall containers and did not implicate the waste form itself. For example, the same day, Rockwell forwarded to DOE a waste certification procedure which characterized pondcrete as a "solid cured mass." This same procedure repeated Rockwell's false statement about Rockwell having in place a procedure whereby, when a pondcrete or saltcrete waste package was rejected for a major defect (waste form nonconformance), Rockwell's Quality Engineering department would conduct an investigation to prevent recurrence of the problem.

86. On March 4, 1988, Rockwell prepared a report which contained the following false and fraudulent statements:

"Pond crete is a dry solid consisting of ... sludge immobilized in a concrete matrix."

"[There is an] inability of constituents to migrate

from the stable concrete matrix..."

"The current storage arrangement appears adequate for short-term storage."

87. Rockwell's claim for its award fee for FY 88-1 was false or fraudulent, because Rockwell knowingly used false or fraudulent statements to get it paid and approved.

88. On April 5, 1988, Rockwell falsely and fraudulently stated to DOE that "[a]ll RCRA Compliance Agreement requirements and schedules are being met."

89. Prior to May 23, 1988, there were spills of pondcrete and/or saltcrete that Rockwell knew about, and did not disclose to DOE.

90. On May 23, 1988, pondcrete spilled on the 904 pad and Rockwell (for the first time) reported to DOE that there was insolid pondcrete on the pad. DOE immediately ordered a halt to pondcrete production.

91. Notwithstanding this spill, Rockwell was still on June 1, 1988 providing assurances to DOE that the pondcreting process had worked properly. In a June 1, 1988 version of the Solar Pond Closure Plan, Rockwell stated: "The basic technology used to solidify pond sludges and sediments into pond-crete is the same as that for making salt-crete. Pond-creting was selected because the basic technology has been used and proven to be effective, because the plant has experience with the process [sic] the pond-crete meets the requirements of the Department of Transportation (DOT) regulations for shipping, and the material meets the requirements of the Nevada Test Site for solidification of radioactive waste."

92. On June 30, 1988, Rockwell submitted to DOE the first of three versions of a UOR on the May 23, 1988 pondcrete spill. This report, and the subsequent versions submitted on November 14, 1988 and February 23, 1988 were false and fraudulent in that they indicated that the

problem of pondcrete insolidity on the pads was only discovered by Rockwell on May 23, 1988.

93. Beginning on May 23, 1988 and continuing through December 31, 1989, Rockwell continued its fraud upon DOE in connection with pondcrete and saltcrete by repeatedly falsely stating that the problem of leaching, leaking, and insolid pondcrete on the storage pads was not discovered by Rockwell until May 23, 1988. In some instances, Rockwell caused such statements to be made by DOE officials in letters to other government officials and members of Congress. Rockwell's false and fraudulent statements in this regard include, but are not limited to the following:

5/25/88	"[T]he unsolidified cement was discovered [on May 23, 1988]."
6/6/87	"Pond-Crete operations ceased on Monday, May 23rd upon identification of the problem."
6/7/88	"Pondcrete production operations ceased on May 23, 1988, just subsequent to the discovery of destabilized pondcrete on the 904 pad."
7/22/88	"It was discovered in late May [1988] that some boxes of the cemented waste form 'pondcrete' had not properly cured. The problem was first discovered when heavy rains saturated some of the pondcrete blocks' triwall containers, allowing the contents of one box to spill onto the 904 Pad."

7/22/88	"Since it was discovered in late May that the cemented waste form ("pondcrete") had not cured properly...The problem was first discovered when heavy rains saturated some of the pondcrete blocks' triwall (cardboard) containers, allowing the contents of one box to spill onto the 904 pad."
7/29/88	Rockwell advised DOE that there was a "second" pondcrete spill, and that last May it was discovered that some blocks had not cured.
8/88	"Pondcrete production operations ceased on Monday, May 23, 1988, just subsequent to the initial discovery of destabilized pondcrete on the 904 pad."
9/15/88	"Spills have only occurred to date at the 904 Pad."
12/21/88	Q. When were the defective blocks discovered? A. In May 1988, plant personnel discovered some blocks with unsolidified cement following heavy rains that saturated some of the blocks' fiberboard containers."
9/30/89	"Two spills of Pondcrete at Pad 750 have occurred to date ... These Pondcrete spills occurred on August 25 and August 28, 1989. Saltcrete spills first occurred on November 1, 1988." (p. 45)

9/30/89	"The first spill of pondcrete occurred on May 23, 1988..."

94. During the summer and fall of 1988, at DOE's direction, Rockwell initiated a process, activities that were made necessary because of Rockwell's failure to properly manufacture, store, and handle the pondcrete and saltcrete in conformity with RCRA and other applicable laws, regulations, and DOE orders, and by Rockwell's misrepresentations, false statements, concealments, and omissions to DOE, which are described above, of having to repackage, reprocess, and repair the pondcrete and saltcrete that it had manufactured.

95. During this period, Rockwell also carried out extensive inspection and testing procedures for all pondcrete and saltcrete blocks, activities that were made necessary because of Rockwell's failure to properly manufacture, store, and handle the pondcrete and saltcrete in conformity with RCRA and other applicable laws, regulations, and DOE orders, and by Rockwell's misrepresentations, false statements, concealments, and omissions to DOE, which are described above.

96. In 1989, Rockwell continued to inspect, test, repackage, reprocess, and repair the pondcrete and saltcrete it had manufactured, activities that were made necessary because of Rockwell's failure to properly manufacture, store, and handle the pondcrete and saltcrete in conformity with RCRA and other applicable laws, regulations, and DOE orders, and by Rockwell's misrepresentations, false statements, concealments, and omissions to DOE, which are described above.

97. From 1990 through the present, Rockwell's successor contractors have continued to inspect, test, repackage, reprocess, and repair the pondcrete and saltcrete Rockwell had manufactured, activities that were made

necessary because of Rockwell's failure to properly manufacture, store, and handle the pondcrete and saltcrete in conformity with RCRA and other applicable laws, regulations, and DOE orders, and by Rockwell's misrepresentations, false statements, concealments, and omissions to DOE, which are described above.

98. On June 13, 1989, Rockwell's Chairman and Chief Executive, Donard R. Beall, falsely represented to Secretary of Energy James D. Watkins that "the Plant has been run ... in compliance with applicable laws and regulations."

99. Rockwell's claim for its award fee for FY 88-2 was false or fraudulent, because Rockwell knowingly used false or fraudulent statements to get it paid and approved.

100. Rockwell's claim for costs for FY 88 was false or fraudulent, because Rockwell knowingly included costs for defective pondcrete, and because Rockwell knowingly used false or fraudulent statements to get this claim paid or approved.

101. Rockwell's claim for its award fee for FY 89-1 was false or fraudulent, because Rockwell knowingly used false or fraudulent statements to get it paid and approved.

102. Rockwell's claim for costs for FY 89 was false or fraudulent, because Rockwell knowingly used false or fraudulent statements to get this claim paid or approved.

103. Rockwell's claim for its award fee for FY 89-2 was false or fraudulent, because Rockwell knowingly used false or fraudulent statements to get it paid and approved.

104. Plaintiffs' claims for damages are set forth in the applicable section of the pre-trial order.

C. SPRAY IRRIGATION

1. Plaintiffs United States and James S. Stone contend further that Rockwell also violated the False Claims Act in relation to its spray irrigation activities.

2. From November 26, 1984 and continuing through

December 31, 1989, effluent from the sewage treatment plant at Rocky Flats was generally discharged to the B-3 Pond, from which it was either discharged through Outfall 001 to the B-4 and B-5 Ponds or spray irrigated. Water spray irrigated from the B-3 Pond by Rockwell during this same period also consisted of plant runoff and, at times, may have included intercepted groundwater originating from the solar ponds.

3. Between November 26, 1984 and December 31, 1989, the spray fields located at the east side of the Plant were generally referred to as the "east spray field."

4. The east spray field was comprised of the North Spray Field, located north of the B-series ponds, in the North and South Walnut Creek drainages, and the South Spray Field, located primarily south of the East Access Road, draining to both the South Walnut Creek and Woman Creek drainages.

5. Between November 26, 1984 and December 31, 1989, Rockwell operated Rocky Flats under an NPDES permit issued by EPA.

6. The NPDES permit authorized the discharge of effluent and other waters, in accordance with its terms, into North Walnut Creek, South Walnut Creek and Woman Creek. The NPDES permit established particular locations or "outfalls" where such discharges could occur, set particular parameters or discharge limits at each such outfall, and required that each outfall be monitored and the results reported to EPA.

7. Rockwell understood that it was required to promptly inform DOE of all violations of the 1984 NPDES permit of which it became aware.

8. Between November 26, 1984 and December 31, 1989, Rockwell submitted to DOE a Monthly Monitoring Report which included a draft letter from DOE to EPA regarding NPDES compliance during the preceding month.

9. Between November 26, 1984 and December 31, 1989, Rockwell believed it was a violation of the Plant's 1984 NPDES permit to allow runoff from spray irrigation operations at the east spray fields to enter Woman Creek downstream of the C-2 Pond.

10. In January 1987, Rockwell's east sprayfield spray irrigation activities resulted in the flow of substantial amounts of runoff directly into Woman Creek. Rockwell knowingly failed to include these NPDES permit violations in its Monthly Monitoring Report it submitted to DOE for the month of January 1987.

11. On March 2, 1987, direct runoff of spray-irrigated effluent into Woman Creek as a result of spray irrigation by Rockwell on March 2, 1987 was reported by Rockwell, and was cited by DOE as a "notable deficiency" in Rockwell's "Award Fee Performance Evaluation Report" for the period October 1, 1986 through March 31, 1987.

12. In response to DOE inquiries, in March 1987 Rockwell knowingly repeated to DOE the false statement it had made in the Monthly Monitoring Report provided to DOE for January 1987, and continued to conceal from DOE the NPDES permit violations at the East Spray Field during January 1987 resulting from runoff of spray irrigated effluent directly into Woman Creek.

13. Plaintiffs allege that Rockwell knowingly concealed from or otherwise misled DOE regarding Rockwell's violations of the NPDES permit in January 1987, and has continued to conceal or otherwise mislead DOE regarding these violations to the present.

14. Rockwell's false claim with respect to spray irrigation consists of Rockwell's request for and receipt of the Cost-Plus Award Fee ("CPAF") for the six-month period encompassing the month of January 1987 (October 1, 1986 through March 31, 1987). The false statements submitted by Rockwell in support of this false claim were (1)

the Monthly Monitoring Report submitted by Rockwell to DOE for the month of January 1987; (2) Rockwell's representations to DOE in March 1987 that no NPDES violations involving direct runoff to Woman Creek occurred in January 1987, as reflected in DOE's letter to EPA dated March 19, 1987; and (3) Rockwell's continued concealment from DOE, from January 1987 through December 31, 1989, of the existence of direct Woman Creek runoff in January 1987.

FALSE STATEMENTS AND CLAIMS BY FISCAL YEAR AND DATE

Date	False Statement
10/9/86	"Rocky Flats is currently evaluating on-site storage alternatives to house the cemented product until appropriate disposal facilities become available. The storage alternative selected will meet legal requirements for such sites." "The onsite storage of this material in a cemented form presents no hazard to the public or the environment."
10/28/86	Rocky Flats complies with the regulations, policies, and criteria as stated in: NVO-185, DOE Order 5820.2, DOE Order 5480.3, DOE Order 5480.2, DOE Order 5480.4, and DOE Order 5700.6A "As part of the Compliance Agreement, all waste streams at Rocky Flats Plant are being analyzed, ... If hazardous constituents are identified as being present in any low level wastes, storage of such waste forms is initiated to comply with the regulations."
11/86	The triwall boxes act as a form until the cement has cured; once cured, the box is not necessary to contain the waste.

11/19/86	"Rocky Flats will be storing up to approximately 20 million pounds of salt crete and pond crete, primarily on an asphalt pad...Rockwell must actively support DOE in its efforts to certify this site, and in the interim assure that all waste forms are stored in a safe, secure manner."
1/5/87	"When waste packages are rejected for reasons other than minor errors, a Corrective Action Notification (CAN) Letter must be attached to the card copy of the WRR (see Figure 2). The CAN letter notifies the generator that an inspector must be present when the nonconformance is being corrected... When writing the rejection, the inspector will indicate in the "HOLD" box of the WRR that a CAN letter was attached by writing the letters "CAN" in the this area. Writing "CAN" in the hold box will notify Quality Engineering that this rejection requires an engineering investigation. The WRR will then be forwarded to the responsible engineer for review, investigation and recurrent control."
2/87	"In the interim, the waste [radioactive mixed waste] is being stored at RFP, conforming to all RCRA requirements."

	Rockwell, in the Monthly Monitoring Report it submitted to DOE for the month of January 1987, falsely stated that there were no violations of the NPDES permit that month resulting from runoff of spray-irrigated sewage effluent directly into Woman Creek.
3/1/87	"The basic technology used to solidify Pond 207-A sludge into pond-crete is the same as that for making salt-crete. Pond-creting was selected since the basic technology has been used and proven to be effective, since the plant has experience with the process and since the pond-creting meets the requirements of the Nevada Test Site for solidification of radioactive waste."
	Rockwell, in March 1987, both repeated the false statement it made in the Monthly Monitoring Report provided to DOE in January 1987, and concealed from DOE the existence of NPDES violations at the East Spray Field during January 1987 resulting from runoff of spray-irrigated sewage effluent directly into Woman Creek.
Rockwell's Claim for FY87-1 Award Fee.	False due to the use of false or fraudulent statements to get Rockwell's award fee claim for FY 87-1 paid or approved.

6/4/87	"Our present storage arrangements are adequate for short term protection against the elements..." Pondcrete should be RCRA de-regulated due to "the inability of the constituents to migrate from the stable concrete matrix."
6/23/87	"All compliance agreement dates have been and are being met."
7/6/87	"Production of pondcrete waste boxes continues to exceed the established goals."
7/6/87	"All deadlines required by the Rocky Flats Compliance Agreement were met and the Resource Conservation and Recovery Act compliance, with approved exceptions, was achieved." "In July 1986, DOE signed a Compliance Agreement with the Environmental Protection Agency, and the Colorado Department of Health which committed DOE and Rockwell to an extremely aggressive environmental monitoring and remedial action program. Rockwell has met or exceeded all Compliance Agreement requirements in an outstanding manner"

8/4/87	"The Solar Pond Cleanout operation continues to exceed the established goals although maintenance downtime has increased slightly. Problems were experienced with the pond pumper, concrete pumper and lumping of cement in the storage silo."
8/11/87	Rockwell Waste Operations personnel directed Tod Anderson to a cell of boxes in the area that had been stored on the 750 pad the longest, and represented to Mr. Anderson that this was a representative sample of the boxes in the area.
8/19/87	"The majority of the mixed waste now accumulating on-site in storage is stored in stable form as concrete blocks (saltcrete or pondcrete)." "These waste forms ... are meeting all RCRA waste storage requirements. Weekly inspections of the waste storage areas are conducted to preclude environmental releases."
8/19/87	"No response action is necessary for [pondcrete or saltcrete]. All areas have waste management being conducted in full compliance with all applicable rules and regulations." "No leaching of hazardous constituents from pondcrete has been identified."

9/3/87	"The Solar Pond Cleanout operation continues to exceed the established goals." The statement goes on to describe minor problems with the operation and states: "Maintenance has provided improved support to complete many of the repairs," thereby representing that Rockwell is immediately resolving all problems that might impede its ability to produce a satisfactory pondcrete product.
9/9/87	RCRA/CERCLA Program Status September 9, 1997. False due to use of term "cement block" to refer to pondcrete/saltcrete and the omission to disclose the insolid, leaking and leaching pondcrete on the pads, especially in the context of Rockwell's affirmative statements to DOE in August 1987 described above.
9/23/87	"Rockwell's six-month self-appraisal provides ample demonstration of its progress in meeting a lengthy list of FY87 second half CPAF goals and objectives...The recent establishment of a RCRA/CERCLA Program is a clear expression of Rockwell's serious intent to be responsive to waste management requirements at Rocky Flats."
9/30/87	"The Solar Pond Cleanout operation continues to exceed the established goals."

Rockwell's Claim for FY87 Costs, as certified in the FY87 "VANNEA"	False Claim due to the inclusion of costs for defective pondcrete and saltcrete, and the use of false or fraudulent statements to get costs claims paid and approved.
Rockwell's Claim for FY87-2 Award Fee.	False due to the use of false or fraudulent statements to get Rockwell's award fee claim for FY 87-2 paid or approved.
11/23/87	"Rocky Flats currently has in storage 13,000 Tri-wall corrugated fibreboard boxes of solidified blocks of salt crete and pond crete which are considered low level mixed waste. Repackaging these in wooden boxes would provide a one time cost impact of $1,500,000 and a continuing additional cost of $120,000 per year. This seems unwarranted considering the noncompressible, stable nature of these waste forms."
12/3/87	"LLW package content rejections, for example, are assigned the highest level of severity. This level rejection requires a "Corrective Action Notification" letter be sent to the responsible management. It also requires the presence of a WC inspector during the repackaging/corrective action. An investigation is conducted by a WC Quality Engineer with findings used to implement the appropriate recurrence control."

12/15/87	"Radioactive mixed waste materials at Rocky Flats are identified, characterized, handled and disposed in a manner which provides for safety of personnel, facilities, and the environment, and which meets the requirements of the Resource Conservation and Recovery Act (RCRA)" "Solar pond sludge and water are mixed with Portland cement and packaged in fiberboard tri-wall boxes according to Rocky Flats procedures. These packages are frequently checked to assure a complete solidification of the sludge."
12/23/87	"All RCRA Compliance Agreement requirements and schedules are being met."
1/28/88	"Rocky Flats currently has in storage 13,000 Tri-wall corrugated fibreboard boxes of solidified blocks of salt crete and pond crete which are considered low level mixed waste. Repackaging these in wooden boxes would provide a one time cost impact of $1,500,000 and a continuing additional cost of $120,000 per year. This seems unwarranted considering the noncompressible, stable nature of these waste forms."

2/88	"No response action is necessary for the [pondcrete and saltcrete]. All areas have waste management being conducted in full compliance with all applicable rules and regulations." "No leaching of hazardous constituents from pondcrete has been identified via environmental sampling surveillance."
2/17/88	"All deadlines required by the Rocky Flats Compliance Agreement were met and the Resource Conservation and Recovery Act compliance, with approved exceptions, was achieved." "In July 1986, DOE signed a Compliance Ag eement with the Environmental Protection Agency, and the Colorado Department of Health which committed DOE and Rockwell to an extremely aggressive environmental monitoring and remedial action program. Rockwell has met or exceeded all Compliance Agreement requirements in an outstanding manner."

2/29/88	Characterizing pondcrete and saltcrete as a "solid cured mass". "When waste packages are rejected for reasons other than minor errors, a Corrective Action Notification (CAN) letter must be attached to the card copy of the WRR (see figure 2) by the Inspector or the responsible Quality Engineer. The CAN letter notifies the generator that an inspector must be present when the nonconformance is being corrected...The WRR will then be forwarded to the responsible engineer for review, investigation, and recurrence control."
2/29/88	"The triple-wall boxes in the lower layers have buckled due to the void space at the tope of each package and the prolonged storage." This report characterizes the problems, which require repackaging, as limited to problems with the tri-wall containers.
3/4/88	"The current storage arrangement appears adequate for short-term storage." Pondcrete ought to be RCRA de-regulated due to "The inability of constituents to migrate from the stable concrete matrix..." "Pond crete is a dry solid consisting of ... sludge immobilized in a concrete matrix."

Rockwell's Claim for FY88-1 Award Fee.	False due to the use of false or fraudulent statements to get Rockwell's award fee claim for FY 88-1 paid or approved.
4/5/88	"All RCRA Compliance Agreement requirements and schedules are being met."
5/25/88	"[T]he unsolidified cement was discovered [on May 23, 1988]."
6/1/88	"The basic technology used to solidify pond sludges and sediments into pond-crete is the same as that for making salt-crete. Pond-creting was selected because the basic technology has been used and proven to be effective, because the plant has experience with the process [sic] the pond-crete meets the requirements of the Department of Transportation (DOT) regulations for shipping, and the material meets the requirements of the Nevada Test Site for solidification of radioactive waste."
6/6/87	"Pond-Crete operations ceased on Monday, May 23rd upon identification of the problem."
6/7/88	"Pondcrete production operations ceased on May 23, 1988, just subsequent to the discovery of destabilized pondcrete on the 904 pad."

7/22/88	"It was discovered in late May [1988] that some boxes of the cemented waste form 'pondcrete' had not properly cured. The problem was first discovered when heavy rains saturated some of the pondcrete blocks' triwall containers, allowing the contents of one box to spill onto the 904 Pad."
7/22/88	"Since it was discovered in late May that the cemented waste form ("pondcrete") had not cured properly...The problem was first discovered when heavy rains saturated some of the pondcrete blocks' triwall (cardboard) containers, allowing the contents of one box to spill onto the 904 pad."
7/29/88	Rockwell advised DOE that there was a "second" pondcrete spill, and that last May it was discovered that some blocks had not cured.
8/88	"Pondcrete production operations ceased on Monday, May 23, 1988, just subsequent to the initial discovery of destabilized pondcrete on the 904 pad."
8/9/88	Boxes of destabilized pondcrete were not moved back to Building 788 before the May 23, 1988 spill.
3/25/88	"Pondcrete production operations ceased on Monday, May 23, 1988, just subsequent to the initial discovery of destabilized pondcrete on the 904 pad."

9/15/88	"Spills have only occurred to date at the 904 Pad." "After an initial period on the 750 storage pad where levels of gross alpha, gross beta, and nitrate were elevated, the levels of contaminates [sic] have decreased. This may have been due to 'dirty' pallets, boxes, and vehicles, with normal precipitation washing the contaminants off."
Rockwell's Claim for FY88 Costs, as certified in the FY88 "VANNEA"	False Claim due to the inclusion of costs for defective pondcrete and saltcrete, and the use of false or fraudulent statements to get costs claims paid and approved.
Rockwell's Claim for FY88-2 Award Fee.	False due to the use of false or fraudulent statements to get Rockwell's award fee claim for FY 88-2 paid or approved.
11/14/88	Discovery of pondcrete insolidity occurred on 5/23/88.
12/21/88	Q. When were the defective blocks discovered? A. In May 1988, plant personnel discovered some blocks with unsolidified cement following heavy rains that saturated some of the blocks' fiberboard containers."
2/23/89	Discovery of pondcrete insolidity occurred on 5/23/88. "These incorrect ratios resulted in Pond-crete which did not thoroughly cure."

Rockwell's Claim for FY89-1 Award Fee.	False due to the use of false or fraudulent statements to get Rockwell's award fee claim for FY 89-1 paid or approved.
6/13/89	"In our judgment the Plant has been run ... in compliance with applicable laws and regulations."
9/30/89	"Two spills of Pondcrete at Pad 750 have occurred to date ... These Pondcrete spills occurred on August 25 and August 28, 1989. Saltcrete spills first occurred on November 1, 1988." (p. 45)
9/30/89	"The first spill of pondcrete occurred on May 23, 1988..."
Rockwell's Claim for FY89 Costs, as certified in the FY89 "VANNEA"	False Claim due to the inclusion of costs for defective pondcrete and saltcrete, and the use of false or fraudulent statements to get costs claims paid and approved.
Rockwell's Claim for FY 89-2 Award Fee.	False due to the use of false or fraudulent statements to get Rockwell's award fee claim for FY 89-2 paid or approved.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE,	)	
Plaintiffs,	)	
vs.	)	89 M 1154
ROCKWELL INTERNATIONAL CORPORATION, et al.,	)	
Defendants.	)	

TRIAL TO JURY - DAY 2
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 9:05 a.m. on the 23rd day of February, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[209]

* * *

Over the three years that are important to this case, 1987, '88 and '89, the government gave Rockwell budgets of over $1 billion to operate Rocky Flats in compliance with applicable laws and regulations. In return, as the evidence we will introduce will show, Rockwell lied about its handling of radioactive toxic pondcrete waste blocks, which Rockwell knew were leaking into the environment.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE,	)	
Plaintiffs,	)	
vs.	)	89 M 1154
ROCKWELL INTERNATIONAL CORPORATION, et al.,	)	
Defendants.	)	

TRIAL TO JURY - DAY 3
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 9:01 a.m. on the 24th day of February, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Testimony of William Francis Weston]

[601]

* * *

Q Now, do you recall an event that occurred on May 23rd, 1988 which pondcrete spilled on the 904 Pad?

A Yes, I do.

Q Were these visits occurring prior to that date?

A Yes, they were. [602]

Q Now, prior to that date did you ever observe any pondcrete blocks on the pad or pondcrete containers on the pad that were leaking--leaking their contents onto the 750

Pad?

A No, sir, I did not.

Q Did you ever observe any pondcrete containers on the pads that were mushy?

A No, sir. I was never aware that there were any mushy containers on the pad prior to May 23rd, 1988.

Q Did you observe any containers on the pads that had pondcrete that for any reason appeared to you to be semiliquid?

A No, sir, I did not--was not aware of any.

Q How did the pondcrete boxes on the pads look to you?

A The pondcrete boxes on the pad in many cases looked very bad --

Q That's the cardboard?

A The cardboard itself was very deteriorated.

Q What about the waste forms themselves inside the cardboard?

A I was not aware that there were any problems with the waste form as in particularly is regard solidification. I was aware that some of the boxes had squashed down some and there was some bulging, but I was not aware that we had a solidification issue prior to May 23rd.

* * *

[631]

* * *

Q We talked a fair amount today about the May 23rd, 1988 pondcrete spill. What do you recall about that spill?

A In a few days before May 23rd, 1988 we had a pretty good rainstorm with winds and there was a lot of damage done, additional damage done to the packaging material. There was a lot of standing water on the pads. The tarps had water on them. The cardboard had deteriorated even further. And, on May 23rd, our crews were out there trying to remediate some of the leaners. They were severely leaning and they dropped one and it split open and its

contents were unsolidified. [632]

Q How did you hear about this? At first?

A I think I was notified by the shift superintendent. I drove in--I came to work fairly early. I used to get in about quarter to 6:00. And as I came up Central Avenue, I saw some guy, or guys, out on the pad, 904 pad. And that didn't surprise me, because after a storm they'd be out there trying to put tarps back in place and clean up and re-stack if necessary.

And in some time within, I think the next hour, I had gone up to my office. I got a call saying that a box had been dropped and split open and we had a spill. And I came down to the pad.

* * *

[635]

* * *

Q Who else was out at the pad.

A Besides our people, Ed Naimon and some of his staff, and of course, the pondcrete workers. I know Kirk McKinley and some of his people went down from the RCRA standpoint, because we were going to have to report a spill up through the Department of Energy to the regulatory agencies. And I believe there were DOE or FAO people who came out during the day to the pad.

Q Do you recall who they were?

A I think Tod Anderson was one. I can't remember if Earl Whiteman came down or not at that point. I know Earl was down some time within the few days, because as we began to see the extent of the issue, Earl came down.

Q And you said you had to notify the regulators due to the fact that there had been a spill?

A This was I think a reportable spill, under RCRA, and as I recall, then we began to go through the formal notification process.

Q And that was a requirement under RCRA?

A Yes, sir.

Q Was it a cause for concern to you that pondcrete had [636] spilled onto the pad? I mean from an environmental perspective?

A I wasn't immediately concerned that we had a huge contamination issue. It was contained. Pondcrete was a relatively innocuous waste form compared to a lot of the others we had. So I knew we could contain it, and there wouldn't be any environmental harm. What I was concerned about was the consistency.

Q When you say it was contained, you mean it was still in the container?

A No, no. But it was a localized area on the pad, and was not like running off the pad, or anything, so we had an opportunity to vacuum it up, clean it up, absorb up the remainder, and handle it that way.

Q What did it physically look like, the pondcrete that had come out of the container onto the pad?

A It was—I'm trying to remember. There was a lot of liquid. And it was sludgy. Solids and liquids. This thing had fallen, you know, from a pretty good height off the forklift and broken open, so it was splattered. And it, you know, it looked like a mess.

Q Do you remember the color?

A No, I don't.

Q And were actions taken then to clean that up?

A Oh yes. Immediately. [637]

Q What was done exactly?

A Well, the immediate remediation would be to clean up all the waste forms, and they get prepared to remediate, and then probably—I think what we did is, we put it in either a plywood or a metal container. And then shoveled up what we could, and then wiped up the rest, and then washed it down.

That was the way you would handle the spill.

Q Were there other boxes on the pad that then were discovered that had unsolid pondcrete?

A Yes, sir. Within the day and the day following, as we began to de-stack and remediate areas, we began to see

more and more of these where it was clear, now that the cardboard was essentially totally gone from the standpoint of any strength to it, that these, you could push in on them—and we began to look more, of course, too. To push in on the sides as we got the boxes down. And began to discover more and more of them. And it was a bigger and bigger concern to us.

Q Did you send your people out right after the spill to check the pad to see if there were others?

A Would you say that again, please?

Q Did you send your people out to sort of canvas the pads to see if there were other problematic boxes now that the spill had occurred?

A Absolutely. I didn't even have to tell them to do that. That was an automatic, that we were going to go out and check [638] both pads now and see what the extent of the problem was.

Q And they found boxes like the one that had spilled?

A They started to find boxes, yes.

Q And they started to find the boxes so it was really a discovery for you and for them?

A Yeah. And I got a report from Dr. Naimon within a day, something like that, when he began to estimate the amount of boxes. And the percentage was high. I mean we're talking several thousand boxes that we were guesstimating could be of this consistency, and we were amazed.

Q And as of May 22nd, 1988, none of your people had noticed this several thousand boxes out there?

A To my knowledge, no, sir.

Q But they noticed them on May 23rd, May 24th?

A As we began to unstack, yes. Some of them were very obvious.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE,	)	
Plaintiffs,	)	
vs.	)	89 M 1154
ROCKWELL INTERNATIONAL CORPORATION, et al.,	)	
Defendants.	)	

TRIAL TO JURY – DAY 4
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 9:04 a.m. on the 25th day of February, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Testimony of William Weston]

[784]

* * *

A In the days immediately following the incident on May 23, 1988, we wanted to try and get our arms around the problem, how many of these boxes potentially could be—could have unsolidified pondcrete. And so we went after the worst stacks, the ones that had the most leaners, and tried to take them all done and see how many of these really look like they could be bad because we couldn't open them on the pad.

So we just had to basically go by the deformation of the container, and if we could and it was—the container was deteriorated enough, then actually try and press the material.

And we tried to make some estimates then and [785] extrapolate across all 17,000 blocks as to how many it could be.

* * *

[786]

* * *

Q ... Okay. So you knew, then, the basis for making that estimate of 2,000 was that there were—what are these dates, November, '87, March, '88? Is that the date of manufacture?

A Those are the date of manufacture, yes, sir, Mr. Williams.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE,	)	
Plaintiffs,	)	
vs.	)	89 M 1154
ROCKWELL INTERNATIONAL CORPORATION, et al.,	)	
Defendants.	)	

TRIAL TO JURY – DAY 5
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 8:30 a.m. on the 26th day of February, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Testimony of Norman Fryback]

[981]

* * *

Q When you first started working on the project, Mr. Fryback, do you recall whether the pondcrete equipment had actually arrived from the contractor yet?

A Some of it was installed and some of it wasn't. My job was to coordinate the installation of the equipment.

Q And what was your position at the time you started working on pondcrete?

A I was a foreman.

Q And that was a foreman for Rockwell?
A Yes.
Q Who was your superior?
A Garvin Hewitt.
Q And who did Mr. Hewitt report to?
A Mr. Naimon.
Q And who did Mr. Naimon report to?
A Mr. Weston.
Q And do you know who Mr. Weston reported to?
A Mr. Sanchini, plant director.
Q Can you describe for me, Mr. Fryback, what pondcrete is?
A Pondcrete is actually a process of cementation of chemical waste that was collected in solar ponds over a period of years, and it was cemented into a block. [982]
Q Mr. Fryback, would it be fair to describe pondcrete as a mixture of sludge and liquids retrieved from the solar ponds and mixed with Portland cement into a concrete matrix which forms a concrete monolith?
A Yes.
Q When you first started in pondcrete as foreman, what stage—I'm sorry, strike that.
How many shifts did you run as foreman at the beginning of the pondcrete operations?
A One.
Q Who were the operators who reported to you working on the pondcrete project at that time?
A I probably will miss some of the names, but Ralph Sprague, Pat, I can't think of—
Q Is that Pat McNeil?
A Pat McNeil, yes, David—let's see, Davie Morrison was there at the very beginning with me. Gosh, I know there's—I think there were approximately five operators that worked for me, and I can't—
Q Was Leif Swenson there at the beginning?
A No, not at the very beginning.
Q Was Howard Long there at the very beginning?

A I believe he was, but I'm not sure on that, whether he was or not.

Q Do you know that both Mr. Long and Mr. Swenson were [983] there by the time you left as foreman?

A Oh, yes, of course.

Q And when was that, Mr. Fryback, that you left as foreman of the pondcrete operation?

A I believe it was sometime in '86 or '87.

Q At the time you left as foreman of the pondcrete operations, had any storage of the pondcrete begun on either the 750 or the 904 pad?

A No.

Q Can you please describe for the jury in relatively simple straightforward terms how pondcrete was made?

A Portland cement was added to the liquid which was retrieved from the pond with a barge like affair which was called a mud cat. It sucked the liquid up into the clarifier, and then was delivered by a diaphragm pump to an extruder, if you will, a mixing chamber, which was a screw operated operation, and in that, it was fed by a surge tank from a—which was supplied from a master storage tank of Portland cement by air transfer into the surge tank, and then it was dropped into the extruder via a star valve, and mixed through the length of the extruder, and then dropped by gravity into the boxes.

Q Okay. Let me see if I can try this as a layman to put it together as well. You basically had sludge in the ponds; correct? [984]

A Yes.

Q And the idea was to get that sludge out and solidify it; is that right?

A Yes.

Q And the sludge from the pond would be removed by a sucking device, a hose that was on a pontoon boat; is that right?

A Yes.

Q And that hose would in turn go into this clarifier that you mentioned; is that right?

A Correct.

Q And then the sludge would be allowed to settle so that you'd get a solid or a more solid sludge—

MR. WILLIAMS: Your Honor, I think it's not inappropriate to try and repeat the witness's testimony, but he's adding to it at this point.

THE COURT: You are.

Q (by Mr. Williamson) Well, Mr. Fryback, would it be fair to say that the clarifier, the purpose of the clarifier was to take—

THE COURT: Why don't you just ask him what was the purpose of the clarifier?

MR. WILLIAMSON: I was trying to simplify it, Your Honor, but I will do that.

Q (by Mr. Williamson) What was the purpose of the [985] clarifier, Mr. Fryback?

A The purpose of the clarifier was to concentrate the sludge and the liquid was decanted back to the pond, the solar pond, and the concentrated sludge liquid mixed was delivered to the extruder.

Q And the sludge would then go from the clarifier into the pug mill; is that right?

A Yes.

Q And it would be mixed with cement in the pug mill?

A Yes.

Q And the cement came from where?

A It came from the big storage tank that would take approximately two semi-loads of Portland cement.

Q And the sludge and the cement would be mixed together in the pug mill; is that right?

A Yes.

Q And then they would be entered into the tri-wall boxes with the plastic; is that right?

A Yes.

* * *

[1001]

Q Mr. Fryback, ultimately were you replaced as foreman of [1002] the pondcrete operations?

A Yes.

Q And by whom were you replaced?

A Ron Teel.

Q Did—prior to that time, did Rockwell management express to you concerns that you were not making pondcrete fast enough?

A Yes.

Q Did you tell Mr. Hewitt, your supervisor, and Mr. Naimon that there was no way pondcrete production personnel could meet the solar pond clean-up deadlines and maintain pondcrete production at the quality level that was acceptable?

MR. WILLIAMS: Your Honor, that's leading.

THE COURT: It is leading.

Q (by Mr. Williamson) Mr. Fryback, did you ever have a conversation with Mr. Hewitt and Mr. Naimon about the ability to meet the solar pond clean-up deadlines?

A Mr. Hewitt for sure; possibly with Mr. Naimon. The recollection of—my contact with Mr. Naimon was not an everyday affair, as it was with Mr. Hewitt. So I, you know, I can't recall whether or not there was--I'm sure we did talk about it, as you said, yes, but I can't put a date to it or anything.

Q Do you remember what you said to Mr. Hewitt about the ability to meet pondcrete clean-up deadlines and its impact [1003] on quality?

A I didn't think that we could get the quality of monoliths I was shipping to Nevada at that time by increasing the number of boxes. You know, there was just not enough space, not enough drying space. There were too many unknowns.

Q Mr. Fryback, did you have a discussion with Mr. Teel about three weeks after he became foreman of the pondcrete operations concerning the amount of cement used in pondcrete production?

A I believe I did, yes.

Q Can you tell me what Mr. Teel told you?

A That he was using less than I was using.

Q Did he tell you that he was using 150 pounds per box?

MR. WILLIAMS: Your Honor, that's leading.

THE COURT: Sustained.

Q (by Mr. Williamson) What amount did Mr. Teel tell you he was using?

A I believe the 150 to 200 pound number is within reason, that I can remember.

* * *

[1040]

* * *

Q Now, backing up to that auger trough, which was—can you say which was the more variable thing that went in there; the cement or the sludge?

A The sludge wasn't consistent. I mean, it was coming out of a settling tank and the settling tank has a V bottom on it and sometimes you'd get a glob of sludge that would come through and that was ideal. You had the right mix. And then, the next time, maybe a slug of water would come through and you'd have a problem. So, it required constant attention and monitoring and then, as the other attorney was talking about, the cement itself varied and you had to keep adjusting that, you know.

Q Well, did you, in fact, adjust the star valve or did it run wide open? Do you remember?

A Well, there was no restrictions on what dumped out of the star valve. The only restriction was—the only thing

was that you would speed the motor up and the star valve would turn faster or slower as per the requirements.

Q When you were actually operating it, do you recall actually turning up or down the speed of the star valve motor [1041] as opposed to adjusting—

A Yeah, I have done that. Yes.

Q Very often?

A My recollections are that it was probably—it wasn't probably done as often as it was throttling down the sludge coming in, you know. I mean, that was an easier control point and much more workable.

Q What you're saying is that the sludge—the variability of the sludge is what you adjusted more often to get the eyeball test passed?

A Right, correct.

Q Okay. Do you have any idea, Mr. Fryback, during the time that you were operating this about how much cement went into a typical box of pondcrete from when you were doing it?

A Anywhere between 200 to 350 pounds.

Q Depending on the sludge?

A Yes.

Q Okay. And, the only test that you used or that you saw anybody use was the eyeball test as to how it looked?

A Yeah. Yeah, we—when I talked to Portland Cement, they had said something about slump and slump testing and stuff like that, but it was—you know, we were dealing with such an impure mix that there was not much of a chance to do that kind of thing.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE,	)	
Plaintiffs,	)	
vs.	)	89 M 1154
ROCKWELL INTERNATIONAL CORPORATION, et al.,	)	
Defendants.	)	

TRIAL TO JURY - DAY 6
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 8:49 a.m. on the 1st day of March, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Testimony of Leif Howard Swenson]

[1108]

* * *

Q Okay. And can you just tell the jury the names of the different foreman with whom you worked on pondcrete operations?

A Norm Fryback and Ron Teel and Dan Tallman. That's the three that I recall.

Q Do you remember, sir, when Mr. Teel replaced Mr. Fryback as foreman of pondcrete operations? [1109]

A Yes.

Q When was that?

A I don't recall the date exactly. I believe 1987.

Q Okay. And when did Mr. Tallman replace Mr. Teel as foreman of the pondcrete operations?

A I believe a year or so later.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE,	)	
Plaintiffs,	)	
vs.	)	89 M 1154
ROCKWELL INTERNATIONAL CORPORATION, et al.,	)	
Defendants.	)	

TRIAL TO JURY - DAY 7
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 8:50 a.m. on the 2nd day of March, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[1362]

* * *

THE COURT: * * * Do you have these requests for admission?

MS. VULLO: Yes, Your Honor. I wanted to read those at this time.

THE COURT: All right. I'll explain the procedure to the members of the jury. I mentioned to you earlier in the case about the Rules of Civil Procedure that govern us in civil cases, and I mentioned to you about the taking of depositions before trial ever begins and, of course, you heard about that from various witnesses who depositions

were taken when there were deposition transcripts used at times. [1363]

There's another procedure that is available to the lawyers in the case before the trial ever begins, and this is called request for admissions. And what this rule provides is that either of the parties can submit to the opposing party, that is, the lawyer, a request to admit certain facts without the necessity of having to prove those facts at trial. And then the party who is asked to admit these facts will either admit them or deny them or can admit them with the condition of making an objection to the phraseology, the terminology, used in the question, not the question but the request.

And the rule provides, then, that when admissions are made in response to the request for admissions, the facts admitted or the particular point admitted—sometimes it's just not a direct fact but something that relates to the case—then that can be used at trial without the necessity of evidence to prove, that is, don't call witnesses or produce documents to prove what's admitted.

And in this case there are certain admissions made by the defendants in response to the plaintiff's request, and we're going to read those to you. Counsel will read them to you now, along with any objections that were contained in the response. All right.

MS. VULLO: Just for a point of clarification, and I can do it either way, we had, I thought, agreed not to read the [1364] objections. But I can do it either way.

MS. BENSON: That's correct, Your Honor.

THE COURT: Well, I thought you told me you wanted to read the objections.

MS. BENSON: And my understanding was—what I wanted them to do was read our entire response and not just pick portions of it. So we agreed this morning that the objections would not be read.

THE COURT: All right. Well, you didn't share your agreement with me. How am I to know? Proceed.

MS. VULLO: Thank you, Your Honor. And I'll just

identify for the record what the request for admissions number is.

The first one I'm going to read is Request for Admission No. 122. And the request is to admit the following: From at least November 26, 1984, and continuing through December 31, 1989, a spray field at Rocky Flats known as the East Spray Field was used to dispose of water from the B3 Pond which received treated waste water, contaminated ground water, and plant runoff.

And the response: Rockwell admits that it acknowledged in the plea agreement and statement of factual basis that a spray field known as the East Spray Field was used to dispose of water from the B3 Pond which received treated waste water, contaminated ground water, and plant [1365] runoff. Rockwell further admits that act between November 24, 1984, and December 31, 1989, with the knowledge of DOE. Spray irrigation was used at various spray fields located on the east side of Rocky Flats to dispose of water from Pond B3, which included treated sanitary waste water and plant runoff. Rockwell denies all remaining allegations contained in this RFA.

The next one is Request for Admission 180. And the request is: Beginning no later than November 26, 1984, and continuing through December 31, 1989, Rockwell was required to inform DOE of any violation of the NPDES permit dated November 26, 1984, and applicable to Rocky Flats immediately upon Rockwell's learning or otherwise becoming aware of such violation.

The response: Rockwell admits that between November 26, 1984, and December 31, 1989, Rockwell understood that it was to promptly inform DOE of all violations of the 1984 NPDES permit of which it became aware, but Rockwell denies that between November 26, 1984, and December 31, 1989, Rockwell knew that its spray irrigation operations at the East Spray Field violated the 1984 NPDES permit and denies all remaining allegations contained in this RFA. Rockwell further states that Rockwell informed DOE and DOE otherwise knew of

Rockwell's spray irrigation practices at Rocky Flats.

The next one is 196. The request is: Beginning no [1366] later than November 26, 1984, and continuing through December 31, 1989, Rockwell knew or was otherwise aware that runoff into Woman Creek downstream of Pond C2 of treated sanitary effluent spray irrigated by Rockwell from Pond B3 was prohibited by the NPDES permit dated November 26, 1984, and applicable to Rocky Flats.

Response: Rockwell admits that between November 26, 1984, and December 31, 1989, Rockwell believed it was in violation of the plant's 1984 NPDES permit to allow runoff from spray irrigation operations at the East Spray Fields to enter Woman Creek downstream of the C2 Pond. Rockwell further states that Rockwell informed DOE or DOE otherwise knew of the conditions under which spray irrigation operations were conducted at the East Spray Fields. Rockwell denies all remaining allegations contained in this RFA.

No. 199. The request is: Beginning no later than November 26, 1984, and continuing through December 31, 1989, Rockwell was required to provide to DOE monthly monitoring reports accurately documenting the status of compliance at Rocky Flats with the requirements contained in the NPDES permit dated November 26, 1984, and applicable to Rocky Flats.

The response: Rockwell admits that between November 1984 and December 31, 1989, Rockwell understood that it was to provide to DOE each month a monthly monitoring [1367] report which contained a draft letter from DOE to EPA including any known violations of the 1984 NPDES permit occurring during the prior month. Rockwell further states that Rockwell informed DOE and DOE otherwise knew of the spray irrigation operations conducted by Rockwell at the East Spray Fields. Rockwell denies that it knew that the spray irrigation operations at the East Spray Fields violated the plant's 1984 NPDES permit and denies all remaining allegations contained in this

RFA.

No. 147. Request: On or about March 2, 1987, spray irrigation by Rockwell at Rocky Flats of treated sanitary effluent from Pond B3 resulted in runoff of such effluent into Woman Creek downstream of Pond C2.

The response: Rockwell admits that on March 2, 1987, some treated sanitary effluent sprayed from Pond B3 ran off into Woman Creek downstream of Pond C2. Rockwell denies all remaining allegations contained in this RFA. 149. The request: Runoff of spray irrigated sanitary effluent into Woman Creek as a result of spray irrigation by Rockwell on or about March 2, 1987, was observed by a DOE employee prior to Rockwell having provided DOE notification or otherwise making DOE aware of the runoff of such treated sanitary effluent.

Response: Rockwell admits that runoff of the spray irrigated treated sanitary effluent into Woman Creek as a [1368] result of spray irrigation by Rockwell on March 2, 1987, was first observed by John Krueger, an employee of the DOE Rocky Flats area office. Rockwell denies that Rockwell did not tell DOE and DOE was not otherwise aware of the potential for runoff from the East Spray Fields prior to this date. Rockwell denies all remaining allegations contained in this RFA.

144. Request is: In or about March 1985 a Rockwell employee completed a "Rocky Flats engineering job order" dated March 12, 1985, requesting the construction of a ditch line to divert runoff of treated sanitary effluent spray irrigated from Pond B3 to the south interception ditch and/or Pond C2 stating that runoff water from the spray irrigation system from Pond B3 may be entering Moore Reservoir or Standley Lake via Woman Creek and stating that the proposed collection ditch is necessary to prevent a NPDES discharge permit violation.

Response: Rockwell admits that in or about March 1985 a Rockwell employee prepared a Rocky Flats engineering job order, EJO, dated March 12, 1985. Rockwell states that the EJO speaks for itself and denies all

remaining allegations contained in this RFA.

No. 145. The request is: Between March 1985 and March 1, 1987, Rockwell did not construct the ditch referenced in the Rocky Flats engineering job order dated [1369] March 12, 1985.

Response: Rockwell admits this RFA.

And then the last one is 148. The request is: Subsequent to March 2, 1987, Rockwell installed a trench around the southeastern perimeter of the land area at Rocky Flats located south of the B3 Pond on which Rockwell spray irrigated treated sanitary effluent to divert runoff of treated sanitary effluent resulting from spray irrigation to the C2 Pond.

And the response: Rockwell admits this RFA.

That's it, Your Honor. Thank you.

THE COURT: Members of the jury, under this rule the matters that have been admitted by the defendant Rockwell in response to the request for admissions are established and there's no evidence necessary to establish those matters. They are established.

Now we'll take a recess before calling for the next witness and, as usual, we'll take 15 minutes out for a rest stop, and please continue to follow the cautions you, I know, have heard many times and I'm sure are following. You're excused. 15 minutes.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE,	)	
Plaintiffs,	)	
vs.	)	89 M 1154
ROCKWELL INTERNATIONAL CORPORATION et al.,	)	
Defendants.	)	

TRIAL TO JURY – DAY 13
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 9:01 a.m. on the 11th day of March, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Testimony of Raymond Gregory Romatowski]

[2872]

* * *

Q I think I have one last question for you here on this topic. Assume that in September, 1987, Rockwell had come to you and said essentially the same thing, but I'll state it again, we have just discovered there must have been a breakdown in our pondcrete production and inspection process, because we have just discovered a significant number of leaking and insolid blocks on the storage pads. And assume further that you learn that Rockwell had

known of the leaking and insolid pondcrete at least back to May of 1987, [2873] approximately four months prior, and had concealed from DOE its knowledge in that regard, and that Rockwell had, furthermore, made false statements regarding conditions of the pondcrete on the pads, how would you have reacted to that?

A I vehemently—I mean, that would basically undermine the entire relationship between a company like Rockwell and ourselves. It certainly had the potential for destroying credibility with the regulators. Depending on the severity of the problem and how difficult recovery was, it could really set back relationships with the community. The Congressional delegation would have been up in arms, I'm fairly certain. That's the kind of problem any person like me wants to avoid at all cost.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE,	)	
Plaintiffs,	)	
vs.	)	89 M 1154
ROCKWELL INTERNATIONAL CORPORATION, et al.,	)	
Defendants.	)	

TRIAL TO JURY – DAY 15
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 8:30 a.m. on the 16th day of March, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Testimony of William F. Smith]

[3512]

* * *

Q Mr. Smith, where do you currently work?

A I work for the Center for Strategic Environment Enforcement, Office of Criminal Enforcement, U.S. Environmental Protection Agency.

Q And, what position are you in?

A Director and Special Agent-in-Charge.

Q What are your duties in that position?

A I head the office.

Q Can you briefly describe your educational experience since high school, sir?

A Yes. I have a bachelor of arts in political science [3513] from St. Francis College of Pennsylvania. Bachelor of science in biology from Pennsylvania State University.

Q When did you start working with the EPA?

A In 1984.

Q Where were you located at that time?

A In Denver.

Q And, what was your position?

A I was a Special Agent assigned to the Office of Criminal Investigations, U.S. Environmental Protection Agency.

Q What were your duties in that position, sir?

A To conduct investigations into violations of the environmental laws of the United States.

Q And, did your position change at any time after 1984?

A Yes. In 1987, I became the resident agent-in-charge of the Denver office of the Office of Criminal Investigations, U.S. Environmental Protection Agency.

Q Mr. Smith, were you involved in an investigation of the Rocky Flats Plant that involved the execution of a search warrant at Rocky Flats in approximately June 1989?

A Yes, I was.

Q And, what was your role in that investigation?

A I was lead agent for the Environmental Protection Agency.

Q Were there any other agencies involved in this investigation? [3514]

A Yes, there were.

Q And, who were they?

A The Federal Bureau of Investigation and the Department of Energy, Office of Inspector General.

Q And, can you briefly describe for the jury what

occurred in connection with the execution of that search warrant in June of '89?

A In June of 1989, we obtained a search warrant and executed it at the Rocky Flats Nuclear Weapons Plant early that morning. From there, we basically had teams that were set up. Each team had a lead special agent-in-charge of the team and the teams had designated areas to conduct their searches. After we executed the warrant, teams were issued the proper security badges and went out and conducted their searches.

Q And, over approximately how many days did the execution of this search warrant take place?

A I believe, it took approximately 18 days.

Q And, how many agents approximately were involved in the execution of the search warrant?

A There were 110 people involved. Some of them were technical people, samplers, chemists, and probably 80 of them were agents.

Q And, where did these agents come from?

A All over the country. [3515]

Q Who was the contractor at Rocky Flats at the time of the search?

A Rockwell International Corporation.

Q And, did the search involve the—or did the execution of the search warrant involve the buildings and offices that were occupied by Rockwell personnel?

A Yes, it did.

Q And, did the search also involve the buildings and offices occupied by DOE personnel?

A Yes, it did.

Q At some point during the execution of the search warrant, did you begin to investigate a waste product at Rocky Flats known as pondcrete?

A Yes, I did.

Q When was that?

A It was sometime during the course of the warrant, probably after more than five days into the warrant, we

began specifically looking at pondcrete as an investigative issue.

Q Okay. Had you gone into the search with RCRA in mind?

A Yes, we had.

Q Okay. And, what led you to commence this investigation of pondcrete?

A Through the course of driving around the facility, we noticed a storage area that resembled a parking lot with large numbers of blocks covered with tarpaulins. We also [3516] noticed that there was a sign that designated that as, I believe, RCRA Unit 15 which violations of RCRA were one of the key things we were looking at in the course of the execution of the warrant. So, that led us to inquire as to what was out there and what was on that pad.

Q Okay. With respect to the other agencies and agents that were involved in the execution of the search warrant, what was your role from that point forward with respect to the investigation of pondcrete?

A I basically headed up the pondcrete investigation for the task force.

Q What were the first steps that you and the agents working with you took with respect to pondcrete?

A The first steps were to--we went to Rockwell and basically told them we were going to be inspecting the 904 Pad, as it turned out to be called, during the course of the warrant. And, generally, we had people from, I think, it was Health & Safety with us, as well as our own health and safety people whenever we did anything like that. We then went out to the, as it was designated, 904 Pad and conducted sampling and a search of the 904 Pad.

* * *

[3541]

* * *

Q Right. I was kind of curious why it was it took you five days to spot the 904 Pad.

A Because we were busy. When we initially went in we all had assigned tasks to do, so it was only when some of those assigned tasks were completed that we were able then to look at other areas.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE,	)	
Plaintiffs,	)	
vs.	)	89 M 1154
ROCKWELL INTERNATIONAL CORPORATION, et al.,	)	
Defendants.	)	

TRIAL TO JURY - DAY 20
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 8:54 a.m. on the 23rd day of March, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Testimony of Glenn Lavern Sjoblom]

[4731]

* * *

Q Did DOE have problems with waste solidification at its K25 facility in Oak Ridge, Tennessee?

A Uh, yes.

Q What were the wastes being solidified at that facility?

A Similar to Rocky Flats they had some ponds that had liquids and sludges that contained hazardous and radioactive waste and they were required to process those to remove

them a solidify them.

Q How were those pond sludges solidified at Oak Ridge?

A Well, basically, they pumped the liquids and extracted the sludges, and then mixed them in special mixing equipment [4732] with portland cement and fly ash, and then they--after they felt it was mixed adequately, they put them into 55--90- gallon drums for solidification.

* * *

[4739]

Q What were the wastes that were being solidified at West Valley?

A Again, it was pond wastes and sludges. They also had used the practice of collecting liquid wastes in ponds prior to treatment in the waste treatment facility. They had the same similar process.

Q And, what did they use--what medium did they use to solidify these sludges?

A They also used Portland cement. It was generally accepted, the thought anyway, that that was the way to go; mix it with cement.

Q What did they put this mixed cement plus sludge waste in? What containers? What kind of containers?

A They mixed it in drums. They actually did the mixing in the drums at this site.

Q And then, they sealed the drums and where did they store the drums?

A They stored them under a tarp outside.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE,	)	
Plaintiffs,	)	
vs.	)	89 M 1154
ROCKWELL INTERNATIONAL CORPORATION, et al.,	)	
Defendants.	)	

TRIAL TO JURY - DAY 21
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 9:03 a.m. on the 24th day of March, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Testimony of Glenn Lavern Sjoblom]

[4815]

* * *

Q Now, in your testimony yesterday, sir, I think you said something to the effect that in looking at some of these facilities, you noted that the technology used was not a standard method? Was that something you said yesterday?

A I think it was a generally accepted idea that one could properly solidify these kinds of materials with Portland Cement. But because of the variability of

constituents, because of the problems that result from outside storage, because of the variability in mixture that occurs when [4816] inadequate process controls are used, because of the chemical effects of, for example, nitrates and sulfates on the durability of the cement mixtures, the general idea that one can properly solidify the material doesn't mean that one automatically will unless you thoroughly research the effect your particular wastes are going to have, thoroughly research the proper way to make sure that the range of wastes you have are going to be thoroughly mixed, that the percentages of cement and water and so forth are always within the acceptable ranges.

You won't have a good outcome unless you can do all of those things. And cement solidification had been used before. These are not the first times.

Q In fact, sir, on that—on that point, you mentioned seven different facilities that you testified about relating to late 1980s, early 1990s. How many DOE facilities were there? You mentioned seven. How many were there in total?

A Oh, there's over a dozen. There's also Idaho. There's Mound. There's Fernald. There's Weldon Springs. There's numerous sites.

Q Am I correct, sir, that DOE operated some 100 facilities in 1989?

A Depending on how you define the facility. It could be a single building on a site or it could be—of which there are many. So that would be— [4817]

Q It depends on how you define what a DOE facility is?

A Right. And they may--some of them may have waste processes, and some of them may not.

Q Okay. So let's stick with that. The seven facilities that you discussed in your testimony, those were not the only DOE facilities that had waste processes, are they?

A No, I mean Weldon Springs is a DOE clean-up site in Missouri. Fernald is one in Ohio. In discovery, we weren't given by the Department of Energy or by the plaintiffs in

this case documents on those other sites, and so it was—

Q What's the basis for that statement that you were not given in discovery documents on those sites?

A Just that I didn't receive them, that's all.

Q You don't know whether a request was made and whether it was refused, do you?

A No, I guess I don't.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE,	)	
Plaintiffs,	)	
vs.	)	89 M 1154
ROCKWELL INTERNATIONAL CORPORATION, et al.,	)	
Defendants.	)	

TRIAL TO JURY - DAY 24
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 9:00 a.m. on the 29th day of March, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Closing Argument of Ms. Vullo]

[5079]

* * *

Mr. Fryback also testified that a few weeks after Teel—and you remember Ron Teel, he was our last witness—a few weeks after Ron Teel replaced him as foreman—and that was in late 1986—Teel told Fryback that Teel was reducing

the amount of cement to some 150 to 200 pounds per block, from 600 to some 150 to 200 pounds per block. Fryback also testified that before he was replaced by Teel Rockwell management was pressuring him to make more pondcrete, and Fryback told Hewitt and Naimon that the pressure would result in boxes that were not the right quality of monoliths that [5080] Fryback was shipping to Nevada at the time.

Now, although Fryback was no longer a foreman in '87, he continued to keep a notebook and he even did some inspections of the 750 Pad. He said that one-third of the boxes he inspected were bulging, and it was his opinion that the bulging was because they were not completely solidified.

* * *

[5128]

* * *

You might recall first of all Candy Jierree's testimony that after she learned of the May 23, 1988 spill, she had a conversation with Bill Weston. I told you about one conversation. She talked about another. She said that Weston told her that they tried to maximize waste and minimize cement in order to save money on the cement. What they were doing was they were putting less cement gradually, and the least amount of cement was being done under Tallman because they were trying to exceed their goals. They were trying to get more money from the government. They were trying to get their contract renewed. And Naimon's own documents confirmed the point, you might recall I questioned Naimon about this, and he agreed, the cement was reduced some from 600 to 200. It was reduced throughout the time and continued to be reduced under Tallman's relgn as well.

In fact, even Frank Blaha testified that four days after the May 23, '88 spill, he had a meeting with some of these operators. It was reported to him that less cement was being used. Nobody was talked about the weather or freeze/thaw. They were saying less cement was being used; that's why this thing happened.

In fact, the discoveries after the May 23 spill confirm that there was less cement and, therefore, even less solid pondcrete after Tallman took over as foreman.

* * *

[5135]

* * *

And look at how they describe in here, the same document, in the internal investigation report, after the section on the 750—I'm sorry—after the—I'm sorry, 347. I read to you before the description of 788 building. Under there, they say 904 and 750 pads, internal investigation report says, among other things, "Several of these collapsed under their own weight due to the combination of lack of package integrity and softness of the waste. Preliminary data indicate that not enough cement had been added to the mixture, and efforts are underway to confirm and remedy this situation."

* * *

[5144]

* * *

And, in fact, Tallman's own testimony, the foreman at the time, was that the reason for that de-stabilization—and

that's what it's called, a de-stabilization occurrence, after they said there's a stable concrete waste form, the de-stabilization occurrence, Tallman testified the reason for that was insufficient cement. He doesn't say weather or freeze/thaw.

* * *

[5161]

* * *

No tours of the plant are going to figure out what Rockwell knew, which was inside of there, there was insolid pondcrete, because they were making it wrong, they weren't using enough cement, and they were hiding it from the government.

* * *

[Closing Argument of Mr. Kolar]

[5176]

* * *

Rockwell also admitted in it's UOR report that the causes of the pondcrete problems were causes that were within Rockwell's control. Rockwell was the one that designed the process. Rockwell purchased the equipment. You'll recall some testimony about that. Rockwell installed the equipment. Rockwell's workers watched the equipment, they made the pondcrete, they inspected the pondcrete; and in the UOR report Rockwell essentially admitted that these were things within its control that were the cause: inadequate cement/sludge ratios, poor inspection procedures.

In fact Rockwell never even claimed it used its best efforts in connection with pondcrete and saltcrete until Mr. Stone and the government brought this action to recover the monetary losses stemming from Rockwell's failure to do so.

Rockwell may say to you, but pondcrete was not rocket science. You may recall when Mr. Williams examined Mr. Fryback early in the trial he went through a lot of detail about how the process worked. We saw that essentially a man stood on a platform up by the pondcrete equipment and watched the mixture come in and tried to figure out when it was the right mixture. And Rockwell may say to you this is not scientific, this is not exact. It was inevitable that [5177] such an inexact procedure would have problems.

There are two problems with that argument as it goes to any claim by Rockwell to have used best efforts. The first is what I said before. They installed, designed the process. Their people monitored the process. They said to DOE in March of 1987 pondcreting is a proven technology.

The second problem is the contrast between the pondcrete produced when Mr. Fryback was foreman, and which he said never went to the pads unless it was concrete hard, and the pondcrete that was later produced under Mr. Teel first and Mr. Tallman later. Mr. Fryback was able to get concrete hard pondcrete blocks using the same methods that Mr. Teel and Mr. Tallman used with the exception of one thing, and that is the reduction of cement. And the reduction of cement was something that Rockwell had in its control. Rockwell didn't have to reduce cement.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Richard P. Matsch
[Clerk's Stamp Illegible]

Case No. 89-C-1154

UNITED STATES OF AMERICA
ex rel. JAMES S. STONE, AND
UNITED STATES OF AMERICA,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION,

Defendant.

VERDICT FORM

We, the jury, upon our oath, unanimously answer the court's questions as follows:

Did the plaintiffs prove by a preponderance of the evidence that the defendant Rockwell International Corporation violated the False Claims Act to get one or more of the following claims under the Department of Energy-Rockwell contracts paid or approved?

Award Fee Period 1 (October 1, 1986 to March 31, 1987)

Yes _____ No ____X____

Award Fee Period 2 (April 1, 1987 to September 30, 1987)
Yes ___X___ No _____
Award Fee Period 3 (October 1, 1987 to March 31, 1988)
Yes ___X___ No _____
Award Fee Period 4 (April 1, 1988 to September 30, 1988)
Yes ___X___ No _____
Award Fee Period 5 (October 1, 1988 to March 31, 1989)
Yes _____ No ___X___
Award Fee Period 6 (April 1, 1989 to September 30, 1989)
Yes _____ No ___X___
Vouchers Accounting for Net Expenditures Accrued 1 (September 30, 1986 to September 30, 1987)
Yes _____ No ___X___
Vouchers Accounting for Net Expenditures Accrued 2 (September 30, 1987 to September 30, 1988)
Yes _____ No ___X___
Vouchers Accounting for Net Expenditures Accrued 3 (September 30, 1988 to September 30, 1989
Yes _____ No ___X___
Vouchers Accounting for Net Expenditures Accrued 4 (September 30, 1989 to December 30, 1989)
Yes _____ No ___X___

If you answered one or more of these questions "yes," then state what amount of damages the government sustained as a direct result of the violation(s) of the False Claims Act.

$ 1,390,775.00
(amount of ~~damages if~~ any)

On the breach of contract claim, we find for the DEFENDANT.
(plaintiffs or defendant)

If you find for the plaintiffs, then state what amount of damages the government sustained from Rockwell's breach of contract.

$ 0.00
(amount of damages if any)

Date: 4/1/99 /s/ [Name Illegible]
Presiding Juror

The Denver Post
June 2, 1988

Flats waste containers leaking
Crumbling concrete blocks release toxins, radioactive refuse

By Judith Brimberg
Denver Post Staff Writer

Problems with crumbling concrete blocks of radioactive waste at the Rocky Flats nuclear weapons plant have drawn the ire of state health officials and forced inspection of all 16,000 blocks.

The problem surfaced last week when one block was discovered leaking through its protective package. Instead of being sold concrete, the block reportedly was the consistency of mayonnaise.

Several other blocks appear to be defective, state officials said.

For the past 18 months, Rocky Flats workers have been sealing low-level radioactive sludge and wastewater residue in 1,200-pound blocks for shipment to a Nevada burial site.

At the beginning of the year, however, the ratio of concrete to waste apparently was altered, plant official Kirk McKinley told officials.

After a spot check of 57 blocks turned up eight more defective ones, plant managers promised to inspect the entire inventory of 16,000 blocks, stacked on two asphalt slabs in the northern part of the main facility, north of Golden.

Al Hazle, director of the state Health Department's radiation control division, was critical of the plan for not heeding national standards for mixing concrete, and public health engineer Mike Sattler suggested Rocky Flats may have been remiss in not taking core samples to test how solid the blocks were.

"I understand someone would put his hand on a block to determine how hard it was," Sattler said, describing

inspection procedures. Officials said there is no heath hazard because the waste materials entombed in the blocks – uranium, plutonium, nitrates and acetone – contain only low-level radiation or toxicity.

But Hazle said he still regards the episode to be "of significant magnitude." Sattler said the disintegrating blocks, which are stacked in threes, could pose a physical hazard for plant employees.

The spillage was detected last week following heavy rains and reported immediately to the Colorado health officials and the U.S. Environmental Protection Agency, plant spokesman Pat Etchart said.

At this point, plant executives haven't pinpointed the exact cause although they suspect something went wrong with the concrete curing process.

In the meantime, plant managers are tightening construction and inspection methods and won't ship any defective blocks, Etchart said.

The spillage was washed down with hoses, and the contaminated water flowed down a storm drain and was captured by holding ponds on plant property. Since then, dikes have been built around the asphalt pads to contain any spillage, Etchart said.

Flats faces check of waste packaging
Leak in container found after rains

By Charlie Brennan
Rocky Mountain News Staff Writer

Rocky Flats crews may have to check up to 16,000 containers holding low-level radioactive sludge after one broke open and officials discovered several others were packaged improperly.

Kirk McKinley, who manages cleanup activities at the Department of Energy nuclear weapons plant 16 miles northwest of Denver, confirmed yesterday that faulty packaging of the waste came to light after one of the 1,200-pound bundles fell and broke open May 23 following several days of rain.

"The Package fell over, and about a 2-inch section of the package ripped open, and a little bit of the contents fell out of it," said McKinley, who added that the contents included "some uranium and nitrate contamination."

Rocky Flats spokesman Pat Etchart said the material's radioactivity level was "very, very low," about "50 parts per billion."

Seven of 57 similar bundles that were subsequently checked showed similar packaging problems.

McKinley said the broken bundle discovered May 23 is one of 16,000 packages containing hazardous materials recovered from contaminated solar ponds used for evaporation of high-nitrate wastes.

All bundles were to have been mixed with concrete in a ratio of about 3.5 pounds of cement to 1 gallon of the sludge. But the ratio in the damaged container, McKinley acknowledged, was closer to 1.8 pounds of cement to 1 gallon of sludge.

"We didn't have enough cement in it," McKinley said. "It appears it didn't set up properly."

The sludge was packaged for shipment to the

Department of Energy nuclear testing site in Nevada for disposal.

The problems show that the packages are not ready to be shipped anywhere, said Al Hazle, director of the radiation control division of the state health department.

"It's not in a form that would allow shipment, and the whole purpose of that was to get in a form where they can ship it," said Hazle. "It didn't achieve an environmentally totally inert form."

McKinley agreed that at least some of the packages can't be shipped in their current condition, but said a broader inspection is needed to find out how many are defective, and why.

"We'll definitely have to inspect all those we've made recently and an opinion on what we find will determine how many more we have to go ahead and check," McKinley said.

"We've been making the packages for about two years now, and the ones that are of concern to us were made over the last few months.

McKinley said he didn't know if the problems would delay shipping of the waste.

Anti-flats activists said the faulty packing underscores the waste problems at the facility.

"I think this is just further substantiates our level of concern about quality control out there and demonstrates our urgent need to have independent monitoring out there from another agency," said anti-Flats activist J. Filcher.

U.S. Rep. David Skaggs, D-Boulder, has introduced legislation calling for an independent regulatory agency to oversee all DOE's nuclear weapons facilities for environmental, health and safety matters.

"There are certainly more serious justifications for that than this incident may suggest, but I think it is of a piece that reinforces the need for an independent objective body to take a look at all of these things," Skaggs said.

Wednesday, June 1, 1988
DAILY CAMERA 3C

Radioactive concrete oozed out of packing recently at Rocky Flats

By MARGIE McALLISTER
Camera Staff Writer

After a low-level radioactive concrete block oozed out of its protective packing last week, Rocky Flats officials discovered serious problems with their storage of low-level radioactive waste at the nuclear weapons plant 8 miles south of Boulder.

The spill for the supposedly solid block on the southeast area of Pad 903 at the plant created a meter-wide "hot spot" of low-level radioactivity. The spot has since been covered with asphalt, and a concrete bib now surrounds the 16,000 stored blocks.

Both the Colorado Health Department and Rocky Flats officials say the problem is contained and poses no serious public threat.

"Looking at the radioactive, hazardous-waste standpoint, it's not that dangerous," said Mike Sattler of the state Health Department, who inspected the accident site on May 24. "It would be more dangerous if one of those blocks fell on you."

The blocks weigh 1,200 pounds each and are 40 inches wide and 2 feet high. Called "ponderete," they are composed of cement and sludge from cleanup operations at the plant's contaminated ponds. That sludge contains low-level uranium, nitrates, minute doses of acetone and organic wastes.

The storage problem was discovered May 23 after spring rains, said Rocky Flats spokesman Pat Etchart. Each concrete block is wrapped in plastic, then placed in

cardboard. After the rains, workers realized some of the cardboard boxes were sagging. One had oozed onto an asphalt pad.

"There appears to be a problem with the concrete mixture," Kirk McKinley, who manages cleanup activities at the site, told Rocky Flats Monitoring Committee members Tuesday night. "These blocks are supposed to be solid, but this one (that spilled) had the consistency of mayonnaise."

The ratio of concrete to sludge should be 3.5 pounds of concrete to 1 pound sludge. Instead, 1.8 pounds of concrete was used, McKinley said.

He said plant officials are investigating. The pondcrete is mixed manually, he added.

The problems apparently started in January, according to the state Health Department records. After last week's incident, the plant workers started pulling blocks and testing them. Of the first 57 blocks tested, seven had problems and were not solid.

Rocky Flats workers now must go through all 16,000 stored blocks and check for contents and leaks, Sattler said Tuesday.

6A DAILY TIMES-CALL WEDNESDAY,
JUNE 1, 1988

Flats workers contain spill

GOLDEN (AP) – A spill from a low-level radioactive concrete block at Rocky Flats has been contained and poses no serious public threat, health and company officials say.

The Spill occurred last week when the block came out of its protective coating at the nuclear weapons plant near Golden. The spill from the supposedly solid block created a "hot spot" of low-level radioactivity, officials said.

The spot since has been covered with asphalt and a concrete bib now surrounds the 16,000 stored blocks, plant officials said.

"Looking at the radioactive, hazardous waste standpoint, it's not that dangerous," said Mike Sattler of the Colorado Department of Health, who inspected the accident site May 24. "It would be more dangerous if one of those blocks fell on you."

"There appears to be a problem with the concrete mixture," Kirk McKinley, who manages cleanup activities at the site, told Rocky Flats Monitoring Committee members Tuesday night. "These blocks are supposed to be solid, but this one (that spilled) had the consistency of mayonnaise."

The blocks weigh 1,200 pounds each and are 40 inches wide and 2 feet high. Called "pondcrete," they are composed of cement and sludge from cleanup operations at the plant's contaminated ponds. That sludge contains low-level uranium, nitrates, minute doses of acetone and organic wastes.

The storage problem was discovered May 23 after spring rains, said Rocky Flats spokesman Pat Etchart. Each concrete block is wrapped in plastic, then placed in cardboard. After the rains, workers realized some of the cardboard boxes were sagging. One had oozed onto an asphalt pad.

The ratio of concrete to sludge should be 3.5 pounds of concrete to 1 pound sludge. Instead, 1.8 pounds of concrete was used, McKinley said.

He said plant officials are investigating. The pondcrete is mixed manually, he added.

After last week's incident, the plant workers started pulling blocks and testing them. Of the first 57 blocks tested, seven had problems.

Rocky Flats workers now must go through all 16,000 stored blocks and check for contents and leaks, Sattler said.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA EX REL.
JAMES S. STONE,
PLAINTIFFS,

V.

ROCKWELL INTERNATIONAL CORPORATION AND
BOEING NORTH AMERICAN, INC.
DEFENDANTS.

CIVIL ACTION NO. 89-M-1154

JAMES S. STONE'S RESPONSE TO DEFENDANTS' MEMORANDUM REGARDING ENTRY OF JUDGMENT

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* * *

procedural history of the parties' and the court's prior consideration of the original source issue is warranted.

A. Factual Background

On July 5, 1989, Mr. Stone filed the complaint that initiated this lawsuit against Rockwell under the False Claims Act. More than a year prior to the filing of this suit (and prior to any public disclosure by way of the search warrant or news reports), Mr. Stone and his counsel attended several meetings with agents from the Federal Bureau of Investigation and the Environmental Protection Agency, at which Mr. Stone provided the government with information relating to Rockwell's operations of Rocky Flats and, in particular, certain aspects of its environmental, safety and health record at the Plant which underlie the allegations in this action.

After Rockwell entered its guilty plea in March 1992, discovery in this case first began with Mr. Stone and Rockwell the only parties. In November 1992, Rockwell deposed Mr. Stone for four full days. Relying on that testimony and other discovery, on December 12, 1992, Rockwell filed a motion to dismiss this action for lack of subject matter jurisdiction, arguing that the allegations in this case were based on publicly disclosed information and contending that Mr. Stone was not an "original source" of that information under § 373(e)(4)(A) of the False Claims Act.[3] The parties briefed this issue extensively and submitted supporting factual documentation, including an affidavit of Mr. Stone which demonstrated his direct and

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[3] At around the same time, Rockwell filed two other dispositive motions: a motionf or summary judgment and a motion pursuant to Fed. R. Civ. P. 37(b)(2)(B) for an order limiting the evidence plaintiff can present at trial. Soon after the filing of these motions, Paul, Weiss, Rifkind, Wharton & Garrison appeared in the case on behalf of Mr. Stone. After a response was filed by Paul, Weiss to Rockwell's summary judgment motion, Rockwell withdrew the motion. Rockwell's Rule 37 motion was later denied by the Court.

independent knowledge regarding the matters then at issue in the suit, including the pondcrete, saltcrete and spray irrigation claims that ultimately were tried. Following oral argument, on February 2, 1994, the Court (Carrigan, J.) denied Rockwell's motion, issuing a written opinion in which the Court found that Mr. Stone was an original source of the information upon which the allegations in this action are based – including the allegations regarding pondcrete, saltcrete and spray irrigations – and that this Court accordingly had jurisdiction over the action. Specifically, Judge Carrigan ruled:

> [T[here is evidence that Mr. Stone had direct and independent knowledge that Rockwell's compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments. ...
>
> As a result, I conclude that Mr. Stone possessed direct and independent knowledge of the information on which the allegations [of this action] are based. ...

Opinion at 4-5. Upon Rockwell's request, Judge Carrigan certified this ruling for interlocutory review by the Tenth Circuit. Following additional briefing, on November 16, 1994, the Tenth Circuit declined to hear Rockwell's proposed interlocutory appeal. *From that date forward, this action proceeded through more than four years of discovery, pretrial motions and trial – all without Rockwell ever seeking to revisit Judge Carrigan's findings.*

One year later, on November 14, 1995, the United States moved to intervene in this case pursuant to 31 U.S.C. § 3730(c)(3), on the basis of information provided by Mr. Stone in this action as well as information obtained by the government in its litigation with Rockwell in the Court of Federal Claims. By Opinion and Order dated November 19, 1996, this Court granted the government's motion to intervene. United States ex rel. Stone v. Rockwell Int'l

Corp., 950 F. Supp. 1046 (D. Colo. 1996). In its decision, the Court noted that "what is of paramount importance is the public interest." With the public's interest at the heart of the case, this Court emphasized the importance of the government's participation in the litigation, and in particular, Mr. Stone's contribution in bringing the government into the case. Id. at 1049 ("The declarations filed by John A. Kolar, DOJ-Civil Division trial attorney, persuasively show that information obtained during discovery in the claims court case and made available to him by counsel for Mr. Stone have been important to the decision to intervene.").

At the same time it granted the government's motion to intervene, this Court also denied Rockwell's motion "to enforce" the plea agreement – by which Rockwell had sought to prevent the United States from intervening on the asserted ground that such intervention violated Rockwell's criminal plea agreement. In a direct appeal taken by Rockwell in the criminal case, the Tenth Circuit affirmed this Court's decision on the government intervention. United States v. Rockwell Int'l Corp., 124 F.3d 1194, 1201 (10th Cir. 1997). On April 27, 1998, the Supreme Court denied Rockwell's petition for a writ of certiorari. Rockwell Int'l Corp. v. United States, 118 S. Ct. 1559, 1998 U.S. LEXIS 2826 (1998).

Soon after this Court granted the government's motion to intervene, the government and Mr. Stone jointly filed an amended complaint on December 20, 1996. The amended complaint contained, in its first claim for relief, specific allegations regarding Rockwell's pondcrete, saltcrete and spray irrigation activities at Rocky Flats. The second through fifth claims for relief contained the government's common law claims. And, the sixth claim for relief contained Mr. Stone's FCA claims that the government did not adopt, including his claim regarding plutonium. Rockwell filed its amended answer on January 21, 1997. Later that year, at the May 16, 1997 conference,

this Court severed the plutonium claim so that the case for trial focused on allegations regarding Rockwell's pondcrete, saltcrete and spray irrigation practices.[4]

From the beginning of 1997 until the close of discovery in June, 1998, all three parties – the government, Mr. Stone and Rockwell – conducted extensive discovery in this case. Mr. stone's counsel participated fully in the discovery process, and Rockwell did not object. Indeed, some of the discovery requests propounded to Rockwell (including requests for admission) were made and served by Mr. Stone alone. Not only did Rockwell respond to these discovery requests, Rockwell did not make any objections to the requests on the ground that they had been made by Mr. Stone. In addition, during the more than 100 depositions taken by the parties in the case, Mr. Stone's counsel examined many of the witnesses, and Rockwell's counsel never objected to a single question asked by Mr. Stone's counsel on the ground that Mr. Stone somehow lacked "standing." Mr. Stone's attorneys even attended several depositions of DOE witnesses taken by Rockwell at which DOJ counsel was not present. At these depositions, Mr. Stone's counsel interposed objections to certain of Rockwell's counsel's questions, and Rockwell's counsel permitted her participation and did not object on the ground that Mr. Stone lacked "standing."

Furthermore, at no time during the entire period of discovery following Judge Carrigan's order did Rockwell take any additional discovery relating to Mr. Stone's knowledge regarding pondcrete, saltcrete or spray irrigation. When Rockwell deposed over 55 government witnesses, it did not ask a single question of these witnesses regarding what Mr. Stone may or may not have known about pondcrete, saltcrete or spray irrigation. In short, since Judge Carrigan's February 1994 ruling, Rockwell

[4] Mr. Stone's remaining claim relating to beryllium, also contained in the sixth claim for relief, voluntarily was withdrawn by Mr. Stone.

sought neither additional discovery nor to revisit that ruling.

Nor did Rockwell object on standing grounds to Mr. Stone's various motions to this Court. Most pertinently, during the first part of 1998, Mr. Stone filed a petition seeking the relase of grand jury transcript. Although the government later filed a statement in support of the petition, both the intial petition (on January 15) and the supplemental petition (on May 13) was made *solely* by Mr. Stone. In fact, it was not until the hearing on the petition – an after Rockwell and its former employees filed responses – that government counsel indicated his support for the petition. Neither Rockwell's counsel nor any of the individual intervenors objected to the petition on the ground that Mr. Stone did not have "standing" to be heard in the action. This is despite the fact that Rockwell (and all of the individual intervenors) treated the petition as a very grave matter, and unleashed a virtual flood of separate pleadings and appeals to the Tenth Circuit (which Mr. Stone's counsel argued).

While litigation ensued over the petition to release the grand jury transcripts, the deadline for fact discovery was looming. On April 6, 1998 -- for the first time since November 1992 -- Rockwell requested an additional deposition of Mr. Stone. Because Rockwell already had deposed Mr. Stone for four full days, and because Rockwell had already exceeded its 45-deposition limit, Mr. Stone objected to this deposition absent Rockwell demonstrating a compelling reason for it. In response, Rockwell stated that the purpose of this deposition was to obtain information relating to Mr. Stone's status as an "original source" of the allegations in this case -- the same subject about which Mr. Stone had been deposed for four days in 1992. While Mr. Stone took the position (which plaintiffs reiterate here) that the "original source" issue was properly addressed by Judge Carrigan's February 1994 decision, counsel for Mr. Stone and Rockwell agreed that -- since plaintiffs did not intend to

call Mr. Stone as a witness at trial -- the issue of Rockwell's right to another deposition of Mr. Stone need not be resolved before the trial then scheduled for July 6, 1998. Rockwell never sought to revisit the question after the July 6 trial date was postponed even though Rockwell thereafter sought, and took, several additional depositions.[5]

As trial approached, not only did Rockwell fail to raise the issue, but it effectively conceded Mr. Stone's proper status in its proposed jury instructions. Specifically, Rockwell sought to have the jury instructed that Mr. Stone would be entitled to a share of the recovery on plaintiffs' False Claims Act claim and, to further prejudice the jury against the plaintiffs, that Mr. Stone's state court wrongful discharge claim had been decided against him. Rockwell's proposed jury instructions clearly were inappropriate, having nothing whatsoever to do with any of the issues that the jury had to decide in this case, and provoked several rounds of filings with the Court by plaintiffs and Rockwell. Although Rockwell filed several briefs with the Court on the subject of Mr. Stone's status, Rockwell never renewed its motion to dismiss Mr. Stone from this action or otherwise sought to re-litigate the "original source" issue.

In fact, rather than argue that Mr. Stone was not a proper plaintiff, Rockwell sought to have the jury informed that Mr. Stone would be entitled to a share of the recovery in the event of a plaintiffs' verdict under the False Claims Act. In Rockwell's proposed jury instruction, Rockwell in its own words wrote:

> If a False Claims Act violation is proven in this case, the Court may award Mr. Stone up to 25% of the damages that may be recovered, and any remainder will be paid to the United States government.

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[5] Communications between counsel for Rockwell and counsel for Mr. Stone regarding the deposition of Mr. Stone are documented in a series of correspondence exchanged by counsel. Pursuant to the Court's prior instruction, we have not attached copies of this correspondence but will make them available upon the Court's request.

See Defendant's Instruction No. 1-A ("Preliminary Instruction Before Evidence is Presented"). This position -- whereby Rockwell obviously sought to prejudice the jury against the plaintiffs -- directly conflicts with Rockwell's current position, now that there has been a plaintiffs' verdict, that Mr. Stone and his counsel should get nothing and that judgment should not even enter in Mr. Stone's favor.

Thus, although it had numerous opportunities to do so, at no time from Judge Carrigan's ruling until now did Rockwell ask this Court to dismiss Mr. Stone from this case or restrict in any way his counsel's participation in it. After Mr. Stone filed a response on October 8, 1998 to Rockwell's brief on the proposed jury instructions pertaining to Mr. Stone's role as relator, Rockwell filed a reply brief (on October 28) and a supplemental reply brief (on November 20) but did not file any motion of any kind to dismiss Mr. Stone. In its October 28 Reply, Rockwell raised the issue whether "Mr. Stone and his counsel are allowed to play an active role at the upcoming trial" (at 6), but Rockwell neither sought an answer to this question nor to restrict his counsel's role at trial. Rather than attempt to remove Mr. Stone and his counsel from the case, a few days before trial was to begin, Rockwell and the plaintiffs entered into a Stipulation by which they agreed that the parties would not refer to Mr. Stone's status as relator other than as described by the Court in the juror questionnaire. By so stipulating, Rockwell agreed that the jury would be told that there are *two* plaintiffs in this case, and that Mr. Stone's counsel would participate fully at trial.

Trial commenced on February 22, 1999 and lasted almost six weeks with the announcement of the jury's verdict on April 1, 1999. During the entire duration of the trial, Rockwell did not once object -- even outside the presence of the jury -- to Mr. Stone's role as relator, or to the active participation by Mr. Stone's counsel. Rockwell did not make any motion -- neither written nor oral -- to dismiss

Mr. Stone from this action. In contrast, on two separate occasions during the trial, Rockwell did make motions pursuant to Fed. R. Civ. P. 50 for judgment as a matter of law, which the Court denied. Rockwell first made a Rule 50 motion at the close of the plaintiffs' case-in-chief on March 16, 1999, and then again at the close of the parties' presentation of all of the evidence on March 24, 1999. On neither of these two occasions did Rockwell make any attempt to dismiss Mr. Stone from this action or to limit his counsel's participation in the case.

B. The Purpose, Policy and Plain Language of the False Claims Act Compel Denial of Rockwell's Late-Hour Request

Rockwell argues that, despite the jury's verdict on the False Claims Act claim initiated and pursued by Mr. Stone for ten years, judgment should not be entered in favor of Mr. Stone because, according to Rockwell, he is "not a proper *qui tam* relator." Def. Mem. at 4. But the propriety of Mr. Stone's participation in this litigation was decided by Judge Carrigan in 1994, and this Court should not revisit that ruling at this late stage. Rockwell has made no showing that Judge Carrigan's prior decision was not fully consistent with the structure, language and policy behind the False Claims Act -- because it is.

* * *

[CLERK, U.S. DISTRICT COURT]
[DISTRICT OF COLORADO]
[FILED]
[DATE ILLEGIBLE]
[CLERK NAME ILLEGIBLE]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-M-1154_

UNITED STATES OF AMERICA,
ex rel., and JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION and BOEING
NORTH AMERICAN, INC.,

Defendants.

PLAINTIFF UNITED STATES' SUPPLEMENTAL RESPONSE TO DEFENDANTS' MEMORANDUM REGARDING ENTRY OF JUDGMENT

Plaintiff United States of America, by its undersigned counsel, respectfully submits this supplemental response to Defendants' Memorandum Regarding Entry of Judgment dated April 16, 1999 ("Def. Mem.").

Introduction

On April 16, 1999, Rockwell filed a "Memorandum Regarding Entry of Judgment," in which Rockwell argued, *inter alia*, that judgment on the jury's False Claims Act ("FCA") verdict should be entered solely in favor of the United States, and not in favor of relator James S. Stone on the ground of the "public disclosure/original source" provision of the *qui tam* statute, 31 U.S.C. § 3730(e)(4). The government opposes Rockwell's position that judgment should not be entered in favor of Mr. Stone as well as the United States, and submits this Supplemental Response to explain the basis for its position that judgment should be entered in favor of both plaintiffs.[1]

The government states as follows:

1. On February 2, 1994, this Court (by Carrigan, J.) issued an Order ("1994 decision") denying Rockwell's motion to dismiss this action for lack of subject matter jurisdiction and holding that relator James S. Stone satisfied the "original source" requirement set forth its 31 U.S.C. § 3730(e)(4)(B). The Court described the "gravamen" of Mr. Stone's suit as being a claim that Rockwell concealed from DOE violations of the environmental, safety and health laws ("ES&H") in order to continue receiving payments of award fees and other monies from the government. Order at 2.

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[1] The government's Response To Defendants' Memorandum Regarding Entry Of Judgment, filed May 4, 1999 (which memorandum may have been mistakenly dated May 5, 1999), addressed other issues raised by Rockwell in its Def. Memo. The government was unable to include a discussion of its views on the "public disclosure/original source" issues in its initial Response, because those issues were still being reviewed within the Department of Justice. As explained in the accompanying motion for leave to file this Supplemental Memorandum, the government respectfully submits that the Court's consideration of the government's position on these issues will materially assist the Court in reaching a just resolution of those issues, and, therefore, we seek leave to submit this further memorandum prior to the hearing on judgment issues scheduled for May 7, 1999.

2. Now, after the government, assisted by the vigorous prosecutive efforts of Mr. Stone and his attorneys, has succeeded at trial, Rockwell asks the Court to revisit and reverse its 1994 decision on this issue. Rockwell undoubtedly does so in order to avoid having to pay attorneys' fees and other litigation costs and expenses incurred by Mr. Stone in the course of his effort to prosecute his claim in cooperation with the attorneys for the United States. Rockwell has failed to raise grounds that warrant reconsideration of the 1994 decision.

3. There has been no pertinent change in the law of the Tenth Circuit since the 1994 decision such as to warrant the Court's reconsideration of that ruling.

4. Nor would any injustice to Rockwell result from the Court's refusal to revisit its 1994 decision.

5. Rockwell's contention that the case that plaintiffs presented at trial was somehow a "different case" than the one pleaded by Mr. Stone in his complaint such as to require the Court to reconsider the 1994 decision is wholly without merit.[2] The allegations actually tried clearly came within the gravamen of Mr. Stone's complaint, as defined by Judge Carrigan in the 1994 decision. From February 22, 1999 through April 1, 1999, this action was tried to a jury *inter alia* on the theory that Rockwell used false statements to obtain the payment of false and fraudulent claims for award fees. The jury found that Rockwell did in fact submit false statements to obtain payment of its award fee claims for the six-month time periods ending September 20, 1987, March 31, 1988, and September 30, 1988.

6. Thus, the narrowing that occurred in this case, done at the government's behest for tactical litigation reasons, did not transform the case into a "different case," it

---

[2] For example, at page 13 of Def. Memo., Rockwell states that the Court should reverse its 1994 decision on the ground that the case presented to the jury "bear[s] virtually no resemblance to Mr. Stone's FCA claims as set forth in his July 1989 Complaint."

merely made it a more finely-honed case, a result that advantaged Rockwell as well, because Rockwell was able to focus its defense at trial on narrower allegations. Rockwell's argument that the Court should revisit its earlier ruling on this ground is specious.

7. Finally, the government notes that the question of whether a particular relator is or is not an "original source" is one which affects the government's interests, and the government itself sometimes raises this issue when the government concludes that a relator fails to meet the requirements in 31 U.S.C. § 3730(e)(4). In this case, the government has determined that it will not challenge Mr. Stone's status pursuant to 31 U.S.C. §3730(e)(4), and, for the reasons stated above, the Court should enter judgment on the jury's FCA verdict in favor of both plaintiffs.

Dated: May 6, 1999.

Respectfully submitted,

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Acting Assistant Attorney General

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STEVEN D. TAYLOR
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/s/ Michael F. Hertz
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United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89 C 1154

UNITED STATES OF AMERICA, ex rel.,
and JAMES S. STONE,

Plaintiffs,

vs.

ROCKWELL INTERNATIONAL
CORPORATION, a corporation

Defendant.

PLAINTIFF JAMES S. STONE'S FIRST SUPPLEMENTAL RESPONSES TO DEFENDANT'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Plaintiff James S. Stone, by his attorneys Hartley David Alley; Buchanan, Gray, Purvis & Schuetze; McDermott, Hansen & Reilly; and, Breit, Best, Richman and Bosch, P.C., hereby submits the following Supplemental Responses to Defendant's First Interrogatories and Requests for Production of Documents:

SUPPLEMENTAL RESPONSES TO INTERROGATORIES

Supplemental Response to Interrogatory No. 1:
(Re: Beryllium Machining)

a. Beryllium machining which produced airborne beryllium particles in excess of OSHA and NIOSH standards, and TLV's for beryllium as adopted by D.O.E.

b. Presently unknown. Stone's earliest work concerning airborne Be commenced during 1984 and was ongoing until approximately the date of his termination in 1986.

c. Pending the completion of discovery, Plaintiff cannot identify all documents. However, Stone's documents numerically numbered 310 - 311, 521, 522 - 537, 538 - 540, 548, 587 - 588, 591 - 592, 595 - 596, 598, 601, 603, 610 - 611, 619 - 621, 685, 701 - 706, 708 - 711, 712, 713, 735 - 736, 737 - 739, 740, 742, 744, 762,

* * *

concerning glove-box dump valves in the 700 Complex.

Supplemental Response to Interrogatory No. 11:

Stone contends that the government is entitled to recover all sums to which the government is entitled pursuant to 31 U.S.C. § 3729, et seq. denominated "award fees" together with those denominated "allowable costs," "fixed fees," "base fees," and "goal achievement objectives" as well as all other amounts Rockwell received as compensation under the Rockwell - DOE contracts arising from or related to sums paid to Rockwell by the government on matters as to which a violation of 31 U.S.C. § 3729, et seq. is established, and furthermore, for a sum representing the government's consequential damages as a result of defendant's conduct. Review of the extensive contract documents is ongoing and, when capable of making Plaintiff's damages clearer, Plaintiff will supplement this response further.

Supplemental Response to Interrogatory No. 18:

Stone does not contend that he has direct and independent knowledge as to any category of problem or

method of conducting operations other than those concerning which he has direct and independent knowledge obtained during the course of his employment. As to such matters, Stone contends that to the extent that Rockwell's conduct was the same prior to his employment, and/or that such conduct remained essentially unchanged following plaintiff's termination with Rockwell, that Stone has direct and independent knowledge of such ongoing violations within the meaning of 31 U.S.C.(e)(4)(B). The subject matter concerning which Stone has direct and independent knowledge is set forth throughout his responses to defendant Rockwell's First Set of Interrogatories.

Supplemental Response to No. 19:

See Supplemental Response to Defendant's Interrogatory No. 18. To the extent that Rockwell engaged in the same or similar conduct and submitted claims prior to Stone's employment or following Stone's termination of the same or similar nature to those false claims submitted during Stone's employment, Stone contends he does have "direct and independent knowledge" of such false claims within the meaning of 31 U.S.C. §3730(e)(4)(B).

Supplemental Response to Interrogatory No. 23:

With the understanding that plaintiff has not conducted a meticulous inspection of the thousands of pages of documents produced to date to determine whether any overlap exists, and further subject to the understanding that the context of the various documents produced may conceivably indicate to the contrary, those documents produced to date by Stone which bear Stone's handwritten numerical numbering in the lower right-hand

* * *

DATED this 3rd day of April, 1992.

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/s/ William R. Gray
William R. Gray

ATTORNEYS FOR
PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA ex rel. JAMES S. STONE,	)	
Plaintiffs,	)	
vs.	)	89 M 1154
ROCKWELL INTERNATIONAL CORPORATION, et al.,	)	
Defendant.	)	

TRANSCRIPT OF ORAL ARGUMENT
ON JUDGMENT ISSUES

* * *

I propose then to enter the judgment that says that

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the plaintiffs shall recover this amount, and I haven't yet determined the civil fine aspect of it, but it's my understanding of the statute here that the division of the recovery on damages between the government and Mr. Stone is a matter between the government and Mr. Stone, and as of now, as far as I'm aware, there's no dispute about that. They are not quarrelling about it and, therefore, it's my view that it isn't any of this Court's business as to what that division should be.

I'm of the view that the defendant has no stake in that quarrel. Defendant has to pay, and how the government and Mr. Stone divide it up is up to them. If there were to be a dispute, it would be up to me, but I'm not here to generate disputes that don't exist. So I don't think that question is at all here.

* * *

[FILED]
[UNITED STATES DISTRICT COURT
[DENVER, COLO]
[JUNE 10 1989]
[JAMES R. MANSPEAKER]
[_____ CLERK]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Richard P. Matsch

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA *ex rel.* JAMES S. STONE, AND UNITED STATES OF AMERICA,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL CORPORATION and BOEING NORTH AMERICAN, INC.,

Defendants.

ORDER RESERVING RULING ON MOTIONS FOR FEES AND EXPENSES

On May 27, 1999, the plaintiff James S. Stone filed a motion for attorneys' fees and expenses. On the same date, predecessor counsel for James S. Stone filed a submission of predecessor counsel's fees and costs. Because the court anticipates appeals in this matter which may well affect the determination of these motions, it is

ORDERED that ruling on these motions for fees and costs is reserved until after determination of any appeals.

DATED: June 10th, 1999

BY THE COURT:
/s/ Richard P. Matsch
Richard P. Matsch, Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 99-1351, 99-1352, and 99-1353

UNITED STATES OF AMERICA and UNITED STATES OF AMERICA *ex rel.* JAMES S. STONE,

Plaintiffs-Appellees,

v.

ROCKWELL INTERNATIONAL CORP. and BOEING NORTH AMERICAN, INC.,

Defendants-Appellants.

APPELLANTS' OPENING BRIEF

---

* * *

JURISDICTIONAL STATEMENT

District Court's Jurisdiction. On July 5, 1989, plaintiff-appellee James S. Stone ("Stone") brought this lawsuit against defendants-appellants Rockwell International Corporation and Boeing North American, Inc. (jointly, "Rockwell") under the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729-33 (the "FCA"). (*See* Attachment A.) Seven years later, in 1996, the United States of America (the "government") intervened in this action under Section 3730(c)(3) of the FCA. Stone and the government (jointly, "plaintiffs") contend that the district court had jurisdiction over their claims under 28 U.S.C. § 1345 and 31 U.S.C. §§ 3729-32. Rockwell contends that the district court lacked subject matter jurisdiction over Stone's

claims because Stone is not an "original source" as required by Section 3730(e)(4) of the FCA.

* * *

E. Rockwell's December 1992 Motion To Dismiss for Lack of Jurisdiction

In December 1992, Rockwell filed a motion to dismiss Stone's complaint for lack of subject matter jurisdiction, on the ground that Stone was required to, but did not, satisfy the FCA's "original source" requirement. (133-35.) In response to Rockwell's motion, Stone conceded that his FCA allegations were "'based upon the public disclosure of allegations in ... a criminal hearing ... or from the news media,'" and that he was therefore required to be an "original source." (270, *quoting* 31 U.S.C. § 3730(e)(4)(A).) In an attempt to satisfy this requirement, Stone submitted to the court an Affidavit dated February 27, 1993—*i.e.*, three and one-half years after Stone's July 1989 complaint and Disclosure Statement, and one year after the March 1992 plea agreement and sentencing memorandum. (290-310.)

* * *

DISCUSSION

Stone conceded, and the trial court ruled, that the FCA allegations set forth in Stone's original complaint "involve[d] incidents that were widely covered in the news media." (*See* 270 & 892.) Accordingly, under Section 3730(e)(4)(A) of the FCA, the court lacked jurisdiction over Stone's claims unless Stone was an "original source" of the information on which his allegations were based.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 991351, 99-1352, and 99-1353

UNITED STATES OF AMERICA *ex rel.* JAMES S. STONE,

Plaintiffs-Appellees/Cross-Appellants,

v.

ROCKWELL INTERNATIONAL CORP. and BOEING NORTH AMERICAN, INC.,

Defendants-Appellants/Cross-Appellees..

APPELLEE/CROSS-APPELLANT JAMES STONE'S OPENING/RESPONSE BRIEF

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* * *

B. The Trial Court's 1994 Ruling That Mr. Stone Is An Original Source Was Correct

Notwithstanding its lack of standing, Rockwell's "original source" challenge is without merit, as the Government and two trial judges have concluded. The "original source" component of the FCA's "public disclosure" provision, 31 U.S.C. § 3730(e)(4)(A), requires a relator to possess direct and independent knowledge of the information upon which his allegations are based. United

States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 553 (10th Cir. 1992).[15]

* * *

[15] Although Mr. Stone demonstrated his original source status over all of his FCA allegations, contrary to Rockwell's statement, there was never a finding or concession that the pondcrete allegations had in fact been publicly disclosed prior to the filing fo Mr. Stone's complaint. (App. 270)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA EX REL.
JAMES S. STONE,
PLAINTIFFS.

V.

ROCKWELL INTERNATIONAL CORPORATION AND
BOEING NORTH AMERICAN, INC.
DEFENDANTS.

CIVIL ACTION NO. 89-M-1154

PLAINTIFF JAMES S. STONE'S MOTION FOR A FINDING ON LIMITED REMAND THAT MR. STONE MADE THE REQUISITE DISCLOSURES TO THE GOVERNMENT PRIOR TO FILING THIS ACTION

Plaintiff James S. Stone, by his counsel, respectfully moves this Court for an Order, in accordance with the Tenth Circuit's March 4, 2002 Decision and Order on Rehearing, finding that Mr. Stone made the requisite disclosures to the Government prior to filing this action as required by 31 U.S.C. § 3730(e)(4)(B).

In its Decision and Order on Rehearing, the Tenth Circuit denied Rockwell's petition for rehearing *en banc* and affirmed the judgment and rulings of this Court with a limited remand on the narrow question as to whether Mr. Stone had satisfied the False Claims Act's "pre-filing

disclosure" requirement, 31 U.S.C. § 3730(e)(4)(B). The Tenth Circuit, in accordance with this limited remand, has requested the submission of a supplemental record with this Court's findings and conclusions on the pre-filing disclosure issue.

As set forth more fully in the accompanying memorandum in support of this Motion, the present record demonstrates that Mr. Stone voluntarily provided to the Government, prior to filing his False Claims Act lawsuit on July 5, 1989, the information upon which his allegations in this action were based. This Court can therefore make the requisite findings on the basis of the present record, the pertinent portions of which are discussed in the accompanying memorandum and are attached to the accompanying Affidavit of Maria T. Vullo, Esq.

WHEREFORE, Mr. Stone respectfully requests that the Court (1) enter an order, with accompanying findings and conclusions, reaffirming that Mr. Stone complied with the FCA's pre-filing disclosure requirement, and (2) certify such order to the Tenth Circuit for final disposition.

In accordance with D. Colo. Local Rule 7.1(A), Mr. Stone's counsel has conferred with counsel for Rockwell regarding this motion. Rockwell's counsel has stated that Rockwell does not consent to the relief sought by this Motion, and has also declined to agree to a briefing schedule for this Motion. Accordingly, Mr. Stone also respectfully requests that the Court enter an Order providing that the new Local Rules of this Court, effective April 15, 2002, govern the briefing schedule for this Motion – that is, under D. Colo. Local Rule 7.1 (C), Rockwell shall have 20 days to file its response to this Motion, and Mr. Stone shall have 15 days thereafter to file his reply.

Dated: April 3, 2002

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
By: /s/
Robert E. Montgomery, Jr.
Maria T. Vullo
1285 Avenue of the Americas
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA EX REL.
JAMES S. STONE,
PLAINTIFFS.

V.

ROCKWELL INTERNATIONAL CORPORATION AND
BOEING NORTH AMERICAN, INC.
DEFENDANTS.

CIVIL ACTION NO. 89-M-1154

PLAINTIFF JAMES S. STONE'S MEMORANDUM IN SUPPORT OF MOTION FOR A FINDING ON LIMITED REMAND

Plaintiff James S. Stone, by his counsel, respectfully submits this memorandum in support of his Motion, in accordance with the Tenth Circuit's March 4, 2002 Order on Rehearing which denied the petition for rehearing *en banc* filed by defendants Rockwell International Corporation and Boeing North American, Inc. ("Rockwell") and ordered a limited remand to this Court.

The Issue on Remand

The narrow issue before this Court on remand is whether the information provided by Mr. Stone to the Government before he filed this action satisfied the "pre-filing disclosure requirement," which is the second prong of

the "original source" test set forth in Section 3730(e)(4) of the False Claims Act ("FCA"). The "original source" provision of the FCA, Section 3730(e)(4)(B), imposes two distinct requirements. First, a *qui tam* plaintiff must show that he has direct and independent knowledge of the information on which his allegations are based. Second, he must show that he provided that information to the Government prior to filing suit. The Tenth Circuit found that Mr. Stone had met the first requirement, by demonstrating direct and independent knowledge that Rockwell's pondcrete manufacturing process was defective, and that Rockwell prohibited its employees from disclosing such environmental problems to the Government. The sole issue on remand is whether Mr. Stone provided this information to the Government before filing suit, thereby satisfying the second element of the original source test.[1]

This issue can be readily resolved upon the existing record.[2] This Court has already twice concluded – in 1994 and 1999 – that Mr. Stone is an "original source." In 1994, upon an extensive evidentiary record, this Court held that Mr. Stone had met the pre-filing disclosure requirement. The United States also agreed with the Court's finding of "original source," and filed a statement of support in 1999 that Mr. Stone is a proper relator in this FCA action. In 1999, this Court "expressly adhered" to the Court's earlier

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[1] The Tenth Circuit also remanded for a determination as to whether Mr. Stone satisfied the pre-filing disclosure requirement as to spray irrigation and saltcrete. As we show below, Mr. Stone plainly met this requirement with respect to his spray irrigation claim. Mr. Stone does not contend that he provided information relating specifically to saltcrete to the Government prior to filing suit.

[2] In its decision, the Tenth Circuit recognized that there is "considerable material" in the existing record on the issue, but noted that this Court had not made it the subject of an explicit finding. *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 803 (10th Cir. 2002).

finding. In neither instance did Rockwell dispute this element of the Court's rulings.

Rockwell did not even raise this pre-filing disclosure issue until its Tenth Circuit rehearing petition. Throughout the ten years since it first raised the "original source" issue, Rockwell has always conceded that the information in Mr. Stone's possession was provided to the Government before the filing of the FCA action. Rockwell has argued only that the *type and amount* of Mr. Stone's information did not satisfy the "direct and independent" knowledge requirement, which constitutes the first prong of the statutory test.

When the Tenth Circuit emphatically rejected Rockwell's "first prong" original source argument,[3] however, Rockwell seized upon the recent decision in *United States ex rel. King v. Hillcrest Health Center, Inc.*, 264 F.3d 1271 (10th Cir. 2001) as a peg on which to hang a last-ditch shift of focus to the pre-filing disclosure requirement. By misrepresenting the record in its Petition for Rehearing, Rockwell was able to create uncertainty as to the sufficiency of this Court's factual findings on this previously uncontested issue. As will be demonstrated below, Rockwell continues to pursue a strategy of delay and obfuscation that has imposed substantial burdens on both the relator and the courts. Such conduct should no longer be tolerated.

This Court's task on remand can be performed by reviewing the existing record in the context of the Tenth Circuit's opinion, and making explicit the Court's prior implicit finding that Mr. Stone satisfied the statutory pre-

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[3] *See United States ex rel. Stone v. Rockwell Intl Corp.*, Nos. 99-1351, 99-1352, 99-1353, 2001 WL 1117107, at *8-*12 (10th Cir. Sept. 24, 2001) (withdrawn from publication).

filing disclosure requirement. By this motion, Mr. Stone respectfully requests that this Court make such findings so that Rockwell's appeals will be finally concluded.

* * *

Nos. 99-1351; 99-1352; 99-1353

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.*
JAMES S. STONE,

Plaintiffs-Appellees/Cross-Appellants,

v.

ROCKWELL INTERNATIONAL
CORPORATION and BOEING
NORTH AMERICAN, INC.

Defendants-Appellants/Cross-Appellees.

PLAINTIFF-APPELLEE/CROSS-APPELLANT JAMES S. STONE'S MOTION TO SUPPLEMENT THE RECORD ON APPEAL

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* * *

Procedural Background

On March 4, 2002, this Court remanded to the District Court to make "findings of fact and conclusions concerning the issue of disclosure prior to filing of this action in accordance with the False Claims Act, concerning the saltcrete, pondcrete and irrigation matters and any further proceedings in the district court which the District Judge deems necessary in connection therewith." *United States ex*

rel. Stone v. Rockwell International Corp., 282 F.3d 787, 792 (10th Cir. 2002).[1]

In accordance with the Tenth Circuit's Order, Mr. Stone filed a motion below seeking findings that he had made the requisite disclosures to the Government before filing suit. In response, Rockwell submitted opposition papers, which included additional materials that were not previously before either this Court or the District Court. In particular, Rockwell submitted an affidavit of Kenneth A. Thompson, a former member of the FBI with no personal knowledge whatsoever of the facts of this case. Utilizing the theory espoused in that affidavit, Rockwell argued that, because the available FBI 302 reports contained certain information with regard to Mr. Stone's discussions with the Government prior to the filing of this action, the District Court should infer from alleged "omissions" in those reports that other information was not provided orally to the Government.

In his reply dated May 8, 2002, Mr. Stone objected to Mr. Thompson's affidavit, and further objected to any consideration by the District Court of Rockwell's "omissions" theory based on the FBI 302 reports, on the ground that to do so would be to accept hearsay evidence that lacks probative value. Knowing that the facts completely refute Rockwell's position, Mr. Stone also expressly reserved the opportunity to submit additional evidence that was not in the current record, in the event the District Court were to consider Rockwell's "omissions" theory and the truth of the matters stated (or not) in the 302 reports. Specifically, Mr. Stone's Reply stated:

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1 Citations to "App." and "Supp. App." are to the record before this Court on the main appeal. The entire record on appeal (excluding trial transcripts) consists of six volumes of the Appellants' Appendix ("App."), one volume of Appellee's Supplemental Appendix ("Supp. App."), and one additional volume filed by Appellants with their reply papers. Citations to "Second Supp. App." refer to the accompanying Appellee's supplemental appendix containing submissions on remand and a copy of the November 25, 2002 oral argument transcript below ("Tr.").

Relying on inappropriate personal attacks and innuendo, Rockwell asks this Court to ignore Mr. Stone's affidavit and the other record evidence, and rely solely on what is not stated in FBI reports prepared by an FBI Agent who has never testified in this action and on a newly-devised "expert" affidavit submitted to this Court for the first time on this motion. (Stone Reply at 20)

Rockwell's contention that the unsworn Lipsky reports constitute a "clear" and "complete" record of Mr. Stone's pre-filing disclosures is entirely flawed. As the reports on their face make plain, they do not even purport to be verbatim accounts of the meetings – and their short length proves this point. For instance, Lipsky's memo of the February 17, 1988 meeting expressly indicates that the meeting lasted 3 full hours and 50 minutes, but Lipsky's memo itself consists only of 3 1/2 short pages. A transcript or verbatim account of a meeting lasting close to 4 hours should obviously be much longer. (Stone Reply at 21)

Mr. Thompson's affidavit was not part of [the record submitted to the Tenth Circuit]. Rockwell also has not satisfied disclosure requirements with respect to this new "expert" witness identified after trial. Should the Court nonetheless consider Mr. Thompson's affidavit, Mr. Stone respectfully requests the opportunity for discovery of Mr. Thompson and to submit any additional evidence necessary to respond to Rockwell's extra-record contentions. (Stone Reply at 26, n. 9) (Emphasis added)

The District Court held oral argument on November 25, 2002. On at least two occasions during that argument, counsel for Mr. Stone stated that Mr. Stone was fully prepared to submit additional evidence regarding his pre-filing disclosures:

> MS. VULLO: ... We think that the record before you, and this hearing, is sufficient. However, if Your Honor thought that there were some issues, we obviously don't want to lose subject matter jurisdiction over Mr. Stone's claim, and if [there] are any issues. ... I'd be happy to provide.

(Tr. 21) (The District Court stated that it did not have any questions "excepting what was in those 200 pages," and counsel for Mr. Stone proceeded to answer that question.)

> MS. VULLO: And, again, based upon what we have here, we think Your Honor can make those findings, although if Your Honor had any questions, we'd be happy to provide whatever additional information.

We do object strenuously to the FBI agent expert affidavit.
(Tr. 23)

After counsel for the parties answered the District Court's questions regarding the FBI 302 reports and the Thompson affidavit, the District Court stated its intention to disregard the Thompson affidavit, *as well as its underlying premise that 302 reports are complete and accurate accounts*. Importantly, in this regard, the District Court stated:

> Incidentally, on this narrow point of whether I should consider Mr. Thompson's affidavit, I'm not going to consider it, simply because I think it's speculative. *I've been around a lot of 302s and I've found a good many times when 302s did not encompass all that was said, and sometimes intentionally so.*

(Tr. 38) (emphasis added) Given this statement by the District Court, Mr. Stone did not submit his additional evidence at that time concerning the 302 reports.

On December 17, 2002, however, the District Court issued its order on remand, finding that Mr. Stone provided *written* disclosures to the Government prior to filing suit, but indicating that the record was unclear as to whether, and to what extent, Mr. Stone's information was *orally discussed* at his pre-filing meetings with the Government. *See* December 17, 2002 Order ("Findings") at 5-6. The District Court changed course with respect to the 302 reports, stating: "it is also fair to infer that if Mr. Stone attached such importance to the potential for the leakage of toxic materials from the ponderete blocks that later became the principal issue litigated at trial, there would be some reference to it in the agent's reports." (Findings at 5-6.)

As a result, on December 23, 2002, Mr. Stone filed a Motion for Reconsideration and to Supplement the Record, offering additional sworn affidavits from witnesses with personal knowledge—Mr. Stone and his counsel Hartley David Alley regarding what in fact was *orally discussed* at Mr. Stone's meetings with the Government in 1986-1988 prior to the filing of this suit in 1989. (Attached hereto as Exhibits A and B are true and correct copies of the Affidavit of James S. Stone, sworn to December 23, 2002 ("Stone Supp. Aff."), and the Declaration of Hartley David Alley, sworn to December 23, 2002 ("Alley Decl.")).

Rockwell filed its opposition on January 13, 2003. In its response, Rockwell conceded that the supplemental affidavits contain facts satisfying the pre-filing disclosure requirement, and merely made procedural arguments as to why Mr. Stone's affidavits should be rejected as "untimely." Moreover, in its opposition, Rockwell tellingly did not request an evidentiary hearing or the opportunity to cross-examine Mr. Stone or Mr. Alley. (Second Supp. App. 81-83) On the contrary, Rockwell argued that further hearings would be futile given the passage of time and sought instead

to attack Mr. Stone's credibility on paper. (Second Supp. App. 81)

Without waiting for Mr. Stone to file a reply (which was not due until January 28, 2003), the District Court, by order dated January 21, 2003, denied Mr. Stone's motion to supplement. In its order, the District Court based its decision solely on the ground that Rockwell would be "prejudiced" unless given the opportunity to cross-examine Mr. Stone and Mr. Alley and that such an opportunity "would unduly prolong these proceedings."[2]

As discussed below, there can be no "prejudice" to Rockwell by this Court's consideration of clearly relevant evidence on the issue before this Court. The District Court's reasoning that such consideration would "unduly prolong the proceedings" is wholly without merit. Surely, Rockwell's persistent effort to re-litigate the original source issue cannot be used by Rockwell as a basis for a claim of prejudice to Rockwell, particularly here, where Rockwell seeks to reverse the 1999 judgment in favor of Mr. Stone. Mr. Stone's first pre-filing meeting with the Government occurred in 1986—seventeen years ago. Throughout the years since that time, Mr. Stone has diligently prosecuted this action against Rockwell, in nearly fifteen years of litigation, culminating in a jury trial finding of fraud against Rockwell. On this matter of subject matter jurisdiction, this Court clearly has the authority to supplement the record and consider the supplemental affidavits. Mr. Stone's motion accordingly should be granted.

* * *

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[2] Although the District Court, on January 24, 2003, transmitted a supplemental record to this Court, it included neither the two affidavits attached to Mr. Stone's motion below, nor Rockwell's opposition to that motion.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA *ex rel.* JAMES S. STONE,
PLAINTIFFS,

v.

ROCKWELL AUTOMATION, INC. AND BOEING NORTH AMERICAN, INC.,
DEFENDANTS.

AFFIDAVIT OF JAMES S. STONE

STATE OF COLORADO)
) ss
COUNTY OF)
JEFFERSON

JAMES S. STONE, being sworn, states:

1. I am the *qui tam* plaintiff in this action. I filed this action in July 1989. I am now 78 years of age. I was unable to attend the November 25, 2002 hearing in this action because I was needed at home to assist my wife who had just returned from the hospital two days earlier after suffering a life-threatening blood clot in her lungs.

2. I understand that, on December 17, 2002, the Court issued "Findings and Conclusions on Limited Remand" with respect to the question of the information that I provided to the government prior to the filing of this

action. I understand further that, in issuing such findings, this Court relied on documents prepared by government agents as to two meetings that I had with the government, on June 25, 1987 and February 17, 1988. The Court stated that the agents' reports of those meetings did not mention "pondcrete," which suggested that I did not attach any importance to this potential problem.

3. As I stated in my February 27, 1993 affidavit, my best memory at that time was that I first met with representatives of the United States government about Rockwell's environmental practices and fraud in the summer or fall of 1986, and thereafter met with government agents on numerous other occasions. (App. 306, ¶ 31) I also stated in my 1993 affidavit that the FBI agent reports of my meetings with the government did not describe all of the information that was discussed at those meetings, and there were conversations that I had for which there was no written report. (App. 307, ¶ 33)

4. At the time that I filed my affidavit in 1993, the government had not yet intervened in the case, and Rockwell had filed a motion addressed to my original complaint asserting that I did not meet the "original source" requirements of the False Claims Act. Rockwell's motion was addressed principally to the extent of my direct and independent knowledge, and I submitted an affidavit in response to Rockwell's motion and the arguments made therein.

5. I now understand that, over ten years later, in *King v. Hillcrest Healthcenter, Inc.*, 264 F.3d 1271 (10th Cir. 2001), the Tenth Circuit has ruled that the pre-filing disclosure statement alone is insufficient to satisfy the second prong of the "original source" test, with regard to a relator's pre-filing disclosures.

6. The events in question took place over 15

years ago. I am now 78 years old and have progressively become more forgetful, particularly about details and dates. I do not have perfect memory of the events of 1986, 1987 and 1988 and in particular, I do not have specific memory of every subject that was discussed in any particular meeting or in any particular telephone conversation that I had with the government before I filed this action in 1989. I do recall a lengthy meeting with Mr. Fimberg, Mr. Lipsky and my attorney Hartley Alley. My memory was much better in 1993 when I submitted my prior affidavit in response to Rockwell's motion seeking dismissal of my case. It was not until this year, however, that the Tenth Circuit decided the *King* case, and my pre-filing disclosures became an issue.

7. To the best of my recollection, I provided the government agents in 1986, 1987 and 1988 with the information I possessed regarding pondcrete and spray irrigation. I never once withheld any information from the government. I volunteered a significant amount of information with regard to Rockwell's environmental practices and its failure to report its environmental violations to the Department of Energy. I was fully forthcoming and honest in all of my meetings and telephone conversations with the government. I answered all of their questions. The agents were interested in some topics much more than others, however, and I focused my efforts to provide information on the topics in which they were most interested.

8. In addition, I provided the government with substantial documentation in my possession with regard to Rockwell's deficient environmental practices and fraud. Those documents included:

- Doc. No. 276 – an Engineering Order dated October 13, 1982, containing my review and comments on the designs for solar evaporative pond sludge removal;

- Doc. No. 4 – an Engineering Calculation Sheet, dated December 1, 1980, entitled "Nitrate Waste Irrigation," containing my review and comments on the design for the nitrate waste irrigation system;
- Doc. No. 410 – an internal memorandum to a Rockwell manager, dated March 20, 1984, describing Rockwell's ground water control system as a "latent time bomb;"
- Doc. No. 790 – a listing of Functional Performance Areas (FPA's) for Rockwell with award fee grading area marked; and
- Doc. No. 789 – an excerpt from a Rockwell internal letter concerning award fees which states that "DOE will not even consider an award fee if we do not perform at least at a satisfactory level in all 37 FPA's."

True copies of these documents are attached hereto as Exhibit A.

9. The above documents were provided to the government prior to my filing of the Disclosure Statement in July 1989. To the best of my belief, I provided these documents to Mr. Lipsky in March 1988. Prior to that time, I had personally numbered each of the documents that I provided to Mr. Lipsky, in my own handwriting, in the lower right-hand corner of each document. The documents referenced above include my handwritten numbering, as indicated in the attached Exhibit A. In March 1988, my attorney Hartley Alley and I reviewed the documents to be provided to Mr. Lipsky, and I personally delivered the documents to Mr. Lipsky.

10. To the best of my recollection and belief, I discussed with government investigators information underlying the pondcrete and spray irrigation claims in this action. Such information was based upon my direct and independent knowledge. As to the pondcrete claim, I discussed that Rockwell was utilizing a deficient design for

the mixing of cement and sludge from wastes at the Rocky Flats Plant. At the time that I first examined this issue in 1982, the word "pondcrete" had not yet been created, but the concept was in development. As I stated in my 1982 Engineering Order I believed that the design was deficient and would lead to hazardous environmental conditions. My 1982 Engineering, Order relates to what later became known as "pondcrete." I communicated this information to government investigators in my meetings and telephone calls with them in 1986, 1987 and/or 1988.

11. With respect to spray irrigation, to the best of my knowledge and belief, I also discussed with government investigators in 1986, 1987 and/or 1988 the subject of Rockwell's improper "irrigation" practices at the Rocky Flats Plant with respect to the disposal of liquid wastes that could damage the ground water and surface waters surrounding Rocky Flats. I cannot specifically remember at this time the specific meeting or meetings at which this topic was discussed, but it was discussed in my pre-filing meetings with the government agents. In fact, in the years 1986-1988, I was specifically focused on the spray irrigation problems at Rocky Flats, as that was an issue in my state court case against Rockwell, which was filed on August 20, 1986. As the Court noted in its December 17, 2002 Order, I specifically discussed spray irrigation matters in my state court complaint, and provided a copy of my state court complaint to government investigators in March 1988. (The state court complaint filed August 20, 1986 is attached as Exhibit P to my 1993 Affidavit.)

12. During all of my meetings and telephone conversations with government investigators, my entire purpose was to provide the government with information from which the government could investigate Rockwell's crimes at the Rocky Flats Plant. I did not believe at any time that I had the obligation to stress any particular fact or issue to the government, but rather to provide information

in response to their questions. I understood at the time that the government was investigating Rockwell's environmental practices and I tried to answer any and all questions that they had. I also provided them with the documents in my possession, which included documents on pondcrete and spray irrigation. No one ever told me that the FBI 302 reports could be used in the future to dismiss any False Claims Act action that I might file against Rockwell as a *qui tam* plaintiff. The government investigators never once indicated that they prepared reports in order to set forth every fact that I disclosed to the government in those meetings. In fact, I believed at the time that any notes that the government agents took were protected by government secrecy rules. Had I believed that Rockwell could later use these reports to argue that I failed to provide certain information to the government, I would have made sure to keep a verbatim account of the meetings.

13. For the foregoing reasons, I respectfully request that the Court grant my motion to reopen these proceedings and consider this affidavit and the declaration of Hartley David Alley, Esq. I further respectfully request that the Court conclude that I made the requisite pre-filing disclosures to the government as required by the False Claims Act. I am prepared to answer any questions that the Court might have with regard to these matters, to the best of my memory and belief at the present time.

/s/ James S. Stone
James S. Stone

Sworn to before me this 23rd
day of December, 2002

[Notary Public Seal]

/s/ Jamaine A. Edholm
Notary Public

My Commission Expires 4/23/03

EXHIBIT A

Stone 10-13-82

ENGINEERING ORDER

TYPE OF ACTION

IGINEERING	REVIEW	FINAL
RAWINGS	☐	☐
CONCEP. DES. REPORT	☐	☐
DESIGN CRITERIA	☒	☐
REQUEST FOR DIRECTIVE	☐	☐
OTHER ( )	☐	☐
PROCUREMENT SPECS.	☐	☐
DESIGN DOC.-TITLE I/II	☐	☐
PROCUREMENT SPECS. AND/OR DWGS	IND ☐	PURCH. ☐
CONSTRUCTION ISSUE	ORIG. ☐	ADDENDUM ☐
FUTURE CHANGES TO DWGS. AS REFLECTED ON E.O	☐	
OTHER ACTION SPECIFY	☐	

TYPE OF FUNDING

LI ☐ GPP ☐ CEP ☐ WPAS ☐ EXP ☒

TYPE OF CONSTRUCTION

MAINT ☐ OFF ☒

FIXED PRICE CONTACT ☐

QUALITY ASSURANCE LEVEL

I, IA, (II, IIA, OR III) (CIRCLE ONE OR MORE)

INSPECTION REQUIRED

SOURCE	YES ☒	NO ☐
RECEIVING	YES ☒	NO ☐
CONSTRUCTION	YES ☒	NO ☐

REFER TO EO NO.

EO RELEASE DATE 10-4-82

INITIATOR

A. L. KRIZNAR EXT 69-2722 DATE 9/22/82

PROJ. ENGR.

A. L. KRIZNAR EXT. DATE

FUNCT. MGR.

R. J. Buiz EXT. 2106 DATE 9-30-82

F.O.A.

D. L. Watson EXT. DATE 9/29/82

E.O. COORDINATOR

[illegible] EXT. 2766 DATE 10-1-82 3:30 PM

DISTRIBUTION	BLDG	EO	DWG	DOC	PR
INITIATOR		1	1	1	
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MGR M. MAAS 7776		1	1	1	
PROC MGR					
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COST ENGR MGR		1	1	1	BY PE
MAT'L COORD		1	1	1	
BLDG SUPT					
DEAC	374	1	1	1	
PLANT PROTECTION	373	1	1	1	
UTILITIES MGR	332	1	1	1	
UTILITIES AREA MGR					
MAINT MGR	334	1	1	1	
MAINT ADM SUPPORT	334				
SHIFT AREA MGR					
FAC ENGR ADMIN	206	1			DWG
PURCHASING	601				
DES ACCTG	811				
FAC PROJ ENGR MGR	207	1	1	1	
CONST PROJ ENGR MGR	207	1	1	1	
EQUIP PROJ ENGR MGR	207				
FAC DESIGN ENGR MGR	207	1	1	1	
FAC ELEC DES MGR	207	1	1	1	
BASE DES MGR	701				
POWER ENGR	811	1	1	1	
MTL & CIVIL DES MGR	207	1	1	1	
ENGR PROC DES MGR	207	1	1	1	
LDU BRG	207	1	1	1	
SOURCE INSPECTION	207				
RECEIVING INSPECTION	801				
ENERGY ENGR	207	1	1	1	
GEN MGR (TRANS LTR ONLY)	101				
SAFETY MGT MGR	207	1	1	1	
BDY	101				
SUPT OPER DIV	101				
SEISMIC ANALYSIS	207				
INDUSTRIAL ENGR		1	1	1	
PATENT SYS MGR	201				
AREA SAFETY REP					
TECHNICAL SECURITY	101				
EO COORDINATOR	207				
TOTAL NO. OF COPIES		30	30	25	

DESCRIPTION OF DOCUMENT(S)

DRAWING NO	ISSUE	TITLE
27982-D01		P&ID
" -D02		P&ID
-D03		EQUIP LAYOUT
-D04		STRUCTURAL
-D05		MOTOR POWER PLAN
-D06		ONE LINE ELECT DIA.

DESIGN CRITERIA REVIEW PACKAGE INCLUDING ABOVE DRAWINGS.

This design will not work in my opinion. I suggest that a pilot operation be designed to simplify & optimize each phase of the operation. See L. Fong or L. Eng for details of my objections & potential alternatives.
Jim Stone 10-13-82

RE-[illegible] write me [illegible]

☐ DISTRIBUTE PMR PER PMR DISTRIBUTION LIST

☐ REQUEST FOR ESTIMATE TO COST ENGRG. ONLY

IN-PLANT REVIEW: RETURN YOUR COMMENTS TO A. KRIZNAR BLDG. LAKE ARBOR
BY THURSDAY OCT. 14 OR BRING YOUR COMMENTS TO THE REVIEW MEETING
IN ROOM CONF RM BLDG LAKE ARBOR TIME 1:00 PM DATE FRI. OCT. 15, 1982
REVIEWER'S SIGNATURE [signature] DATE 10-13-82

CHARGE NO	SUFFIX NO.
830	
E.O. NO.	BLDG. NO.
7804	FAC. 207

OJ

TLE SOLAR EVAP. POND SLUDGE REMOVAL

PROJ. NO.	SUB. NO	PAGE NO
420906	—	1 OF 1

RF-48488 (11/81) DESTROY PREVIOUS ISSUES

0439

276

BEST AVAILABLE COPY

JA-606

ENGINEERING CALCULATION SHEET

PROJECT Nitrate Waste Irrigation — PROJECT NO 315332

BY Jim Stone

To: Al. Kriznak w/copy to Bob Jensen — DATE 12-1-80

CALCULATION: — SHEET 1 of 3

[Handwritten Text]:

COMMENTS ON DESIGN CRITERIA:

1. THE IRRIGATION SYSTEM SHOULD BE LOCATED IN THE AREA NORTH OF THE 207 PONDS & THE PSZ FOR THE FOLLOWING REASONS:
   a) LESS ENERGY & COST DUE TO SHORTER DISTANCE BETWEEN SOURCE OF WASTEWATER & DISPOSAL AREA.
   b) THE AREA SHOULD BE CULTIVATED IN ORDER TO UTILIZE THE EXISTING NITROGEN TRAPED IN THE SUBSOIL & TO STABILIZE THE SLOPES AGAINST EROSION.
   c) THE AREA IS DOWN-GRADE FROM THE PONDS & CAN BE SERVED BY GRAVITY WITH A SIPHON SYSTEM.
   d) THE AREA IS DOWN-WIND FROM THE ROCKY FLATS FACILITY.
   e) THE AREA IS NOT SUITABLE FOR OTHER PURPOSES, SUCH AS FUTURE EXPANSION OF THE ROCKY FLATS FACILITY.
2. THE IRRIGATION SYSTEM SHOULD BE A GRAVITY FED DISPERSAL TRENCH SYSTEM FOR THE FOLLOWING REASONS:
   a) THE GEOLOGICAL FORMATION & THE SOIL TEXTURE IS SUITABLE FOR A SHALLOW TRENCH SYSTEM TO DISPERSE THE WASTEWATER INTO THE ROOT ZONE UNIFORMLY.

b) THE SYSTEM CAN BE OPERATED YEAR-AROUND & IS MORE DEPENDABLE THAN A MECHANICAL SPRINKLER SYSTEM.
c) THE SYSTEM HAS LESS OWNING & OPERATING COSTS.
d) THE SYSTEM IS MORE ADAPTABLE TO THE UNIQUE WIND CONDITIONS AT ROCKY FLATS.
e) THE SYSTEM MEETS THE CRITERIA ESTABLISHED BY THE ENVIRONMENTAL & SAFEGUARDS/SECURITY DIVISIONS.

3. REFERENCES:
a) DRAWING – "NITRATE WASTE IRRIGATION #SK-315332-DC-1"
b) "A SUPPLEMENTARY REPORT TO AN ENGINEERING STUDY FOR WATER CONTROL & RECYCLE CONCERNING THE RECOVERY OF NITRATE LADEN GROUNDWATER" BY ENGINEERING-SCIENCE, INC.
c) "SOIL INVESTIGATION (PSZ)" BY CTL/THOMPSON, INC.
d) "20' WIND ROSE – ROCKY FLATS" BY AEC
e) "FREEZE INDEX – USE OF CLIMATIC DATA IN DESIGN OF SOILS TREATMENT SYSTEMS, BOULDER, CO." BY NO & AA
f) "DESIGN MANUAL – LAND TREATMENT" BY EPA 625/1-77-008
g) "CALCULATIONS – AREA REQ'D" BY J. STONE (SHTS 2 & 3)

JA-608

March 20, 1984

Sam Cerise, Manager
F.E. & C. Design Div.
Rockwell International

Dear Sam:

As a follow-up to our meeting an Monday morning and pursuant to a suggestion by my supervisor, Bob Jensen, I propose that you create a position for an in-house engineering consultant, under your direct supervision, and let me fill it. The work would include special studies, the review of A/E design work and technical assistance to design and project engineers.

An indication of the current need is as follows:

1. Emergency Engineering – these are not on the DPL:

    a) Maintenance space needed in the L.A. shop by May 15, 1984.

    b) B881 computer room cooling for this summer – S & W will not complete planned work until September 1984.

    c) B123 contingency plan to keep the labs in operation. ARIX will not have the plans, much less the work, completed by this summer.

    d) ECON projects to meet need for current fiscal expenditure:
    B371 - Cooling of 11 control rooms
    B443 - Piping modification to test, gas valves.

    e) Equipment purchases in less than the regular 120 days delivery.

2. "State of the Art" Engineering Concepts:

   a) B707 Facility redundancy – we must be first in this competition.

   b) Ground water control and utilization - this is a latent time bomb.

   c) Product improvement by an alternate inert environment.

3. Review A/E Design Work – recent failures:

   a) B123 HVAC work which omitted lab make-up air and heating.

   b) B850 Fire Protection piping with design water velocity at 32 ft./sec.

4. Engineering man-hours and scope of work estimates for A/E negotiations in mechanical, chemical, civil and environmental engineering.

5. Interface between working engineers and computer technology in design and project scheduling in order to facilitate Jeff Haberl's work.

The above situations are only those which have occurred recently. They represent a great challenge and opportunity. I try to accommodate these needs between my regular duties, but we are losing ground. I should be on this full time. Thanks for your consideration.

/S/ JAMES STONE

JA-610

FUNCTIONAL PERFORMANCE AREAS
ROCKY FLATS PLANT
8/26/85

GENERAL MANAGEMENT *

TECHNICAL/PROGRAM OPERATIONS

Delivery Performance *
Production Support *
Chemical Operations *
Technical Support
Quality Control *
Development Work
Nuclear Materials Management
Waste Management *
Nonweapons programs

OPERATIONAL SUPPORT

Transportation Safeguards
Security *
Nuclear Safeguards *
Facilities Engineering &
Construction Management
Facilities Maintenance, Utilities
and Energy Conservation Management *
Industrial Safety
Fire Protection
Health Protection
Environmental Protection
Emergency Preparedness
Nuclear Criticality
Facilities Safety

ADMINISTRATIVE SUPPORT

Operating and Capital Resources Management
Financial Management
Legal
Internal Auditing
Automatic Data Processing *
Telecommunications & Data Communications
Records Management
Property Management
Procurement Management
Industrial Relations
Equal Employment Opportunity
Administrative Services
Public Affairs
Classification
Technical Information

* One of the group of FPAs on which CPAF award fees will be based for the 6-month period ending September 30, 1985.

What's the purpose of the 3-month report?

According to Ron Smith, director, Management Systems & Audit, "We use the 3-month report as a corrective tool so that we can take appropriate corrective action before the official 6-month CPAF evaluation."

Does Rockwell have any say in the 3-month grading?

Rockwell reviews the draft preliminary report with DOE/RFAO before it is finalized. "We have the opportunity to discuss grades we don't think reflect the actual performance of the plant," Smith said. "For example, we may believe that a 'significant achievement' which DOE left out should be added. We also have not only the opportunity, but also an obligation, to clarify any situation which could be assessed as deficient, for two reasons: if the assessment is not accurate, to present the facts for proper recognition, or if the assessment is correct, to learn from it and fix it."

How does the 3-month report affect our official 6-month evaluation?

There is some influence, but DOE does not use the 3-month report as an absolute baseline. "We like to think we have the opportunity to work off any deficiencies RFAO perceives in the preliminary 3-month report before the official 6-month CPAF evaluation is performed," Smith said. "Some deficiencies may carry over, but we trust we've corrected all the ones that we can."

How does CPAF affect our operating budget?

CPAF grades do not affect the amount of funding we receive from DOE to operate the plant. However, within our operating budget, DOE gives us the opportunity to earn an award fee. The award fee is based on superior performance in the group of key Functional Performance Areas (FPAs) that DOE identifies for each 6-month CPAF

evaluation period. A higher CPAF grade average can increase the award fee for Rockwell.

Is an award fee automatically given?

No. DOE will not even consider an award fee if we do not perform at least at a satisfactory level in all 37 FPAs (see attached list). If we do perform at least satisfactory overall, then the CPAF award fee is based on an evaluation of the key FPAs.

How is the CPAF award fee allocated?

Award fee dollars go to Rockwell Corporate just like operating profits from other company divisions. Award fee dollars are not allocated in any manner back to the Rocky Flats Plant, except as indirect benefits from Rockwell Corporate. Naturally, superior performance on our part also enhances our working relationship with our customer, DOE.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-M-1154	
UNITED STATES OF AMERICA *ex rel.* James S. Stone, Plaintiffs,	
v.	
ROCKWELL AUTOMATION, INC. and BOEING NORTH AMERICAN, INC., Defendants.	

DECLARATION OF HARTLEY DAVID ALLEY

HARTLEY DAVID ALLEY makes this Declaration under 28 U.S.C. 1746, and declares and states as follows:

1. I am one of the attorneys of record for the *qui tam* plaintiff, James S. Stone, in the above-captioned action. I was first retained as counsel for Mr. Stone in this matter in September 1987. The matters stated herein are within my personal knowledge and are true and correct, to the best of my knowledge. My client has not waived the attorney-client or any other legal privilege, and this affidavit contains no information covered by privilege.

2. I was unable to attend the November 25, 2002 hearing before the Court, as I was with Mr. Stone and his wife who had just suffered a life-threatening pulmonary embolism. I have reviewed the transcript of that hearing and, in particular, the statements by counsel for Rockwell suggesting that the absence of any affidavit or other

statements by me on the subject somehow means that the facts support Rockwell's position. That is simply not true.

3. On December 17, 2002, the Court issued "Findings and Conclusions on Limited Remand" with respect to the question of the information that Mr. Stone provided to the government prior to the filing of this action, and in so doing, relied on certain 302 reports prepared by government agents as to meetings that Mr. Stone and (as to one) I attended in 1987 and 1988. In particular, the Court noted that the agents' reports of those meetings did not mention the word "pondcrete." Accordingly, I respectfully submit this affidavit in light of the Court's reliance on such omissions in FBI 302 reports to infer that Mr. Stone did not discuss with the Government information in his possession respecting pondcrete and spray irrigation. As I discuss below, Mr. Stone did provide the Government with information regarding pondcrete and spray irrigation matters in his meetings with the agents prior to the filing of this action.

1988 Meetings with Government Agents

4. On February 17, 1988, Mr. Stone and I attended a lengthy meeting with William Smith, an EPA Special Agent, Jon Lipsky, an FBI Special Agent, and Kenneth Fimberg, Assistant U.S. Attorney. The meeting, which lasted several hours, began in the morning, broke briefly for lunch, and continued well into the afternoon. The discussion consisted primarily of Mr. Stone describing his knowledge of Rocky Flats, Rockwell's operations, the award fee process, Rockwell's directive to its employees not to discuss problems with DOE, and Rockwell's apparent health, safety, and environmental violations.

5. I expressly recall that, at the February 17, 1988 meeting, Mr. Stone told the government agents that

while working at Rocky Flats he had studied the design and implementation of the solar pond sludge removal process, *i.e.*, the "pondcrete" production process. Mr. Stone explained the function of the solar evaporation ponds as a waste disposal site at Rocky Flats. He informed the Government that he had concluded that the process contemplated by Rockwell for the removal of sludge from this waste site with the use of cement would result in a waste form (also known as "pondcrete") composed of an unstable mixture that would deteriorate and release hazardous wastes.

6. At this meeting, Mr. Stone also informed the government investigators that improper waste disposal, in the form of spray irrigation, was occurring at Rocky Flats. I specifically recall Mr. Stone stating that Rockwell's practice of spray irrigation, which was then occurring on the east side of the plant, involved using sprinkler systems to spray water containing hazardous waste for disposal on open ground and over previous waste burial sites. Mr. Stone also expressed his concern that the contaminated water so irrigated would result in contamination of drainage and groundwater.

7. Mr. Stone's comments regarding the solar pond sludge removal process and spray irrigation were not the primary focus of the February 17, 1988 meeting. Nothing was said or done during the meeting to indicate that Messrs. Smith, Lipsky, and Fimberg were not interested in the pondcrete or spray irrigation matters described by Mr. Stone. It was evident from their questions and demeanor, however, that they were highly interested in Rockwell's operation of incinerators at the Plant and any information Mr. Stone had about it. Additional subjects covered by Mr. Stone which then also appeared to be of more immediate interest to the government agents included Beryllium contamination of workers, the submission of false

applications by Rockwell for award fees, and Rockwell's management structure -- including the names of managers at Rocky Flats. Mr. Lipsky, in particular, was most interested in the design and operation of certain incinerators, and had brought photographs of them to the meeting in order to question Mr. Stone on this subject.

8. During the meeting, I informed Messrs. Smith, Lipsky, and Fimberg that I represented Mr. Stone with respect to claims and rights he had against Rockwell, which claims and rights he was reserving under the False Claims Act. I further stated that Mr. Stone's information, gained at Rocky Flats and through his investigation, would result in proof that Rockwell has knowingly submitted false and fraudulent claims to the Government for payment. After the meeting, I prepared and sent a letter to Mr. Fimberg confirming my statement respecting these matters. (A copy of this letter is attached hereto as Exhibit A.)

The FBI Report of the February 17, 1988 Meeting Is Incomplete

9. I have reviewed the FBI 302 report of the February 17, 1988 meeting, a copy of which is found in the record at App. 460-463 and is attached hereto as Exhibit B. It does not represent a complete account of all of the subjects discussed at the meeting, or of the details of the subjects discussed at the meeting.

10. As an initial matter, I note that the February 17, 1988 meeting, according to the report, lasted 3 full hours and 50 minutes. The FBI report of that meeting, however, consists only of 3½ short pages. A transcript or verbatim account of a meeting lasting nearly 4 hours should clearly be much longer than 3½ pages.

11. Moreover, the FBI report contains numerous omissions and inaccuracies regarding several technical subjects that were discussed at that meeting.

Examples are:

(a) The FBI report fails to mention that Mr. Stone and I expressly informed the Government agents at the meeting that we considered Mr. Stone's reporting to be made under the False Claims Act, a topic I later confirmed in a letter to Mr. Fimberg;

(b) The FBI report inaccurately states that Mr. Stone listed Rockwell employee Dave Guffy as having knowledge about the incinerator in Building 771; in fact, Mr. Stone specifically identified Mr. Guffy as having knowledge of leaking glove boxes in that Building, a subject that the FBI report does not mention at all;

(c) In the meeting, Mr. Stone reported that there were air ducts in Building 881 which were contaminated with dangerously radioactive special nuclear material, but which had not been removed or decontaminated prior to the conversion of part of that Building into office space; the FBI report however, fails to mention this discussion, and mentions only (at the bottom of App. 462) that Mr. Stone "recapped" Building 881 as the location of "contaminated ducts;"

(d) As noted above, Mr. Stone discussed pondcrete which he described as the "solar pond sludge removal" process; however, the FBI report (at App. 463) only makes a passing reference to this discussion as "STONE also said RFNP has numerous waste sites. . .;

(e) As noted above, Mr. Stone discussed several "waste sites" including the fields where the spray irrigation was occurring, and old waste burial trenches on the east side

of the Rocky Flats Plant; however, the FBI report appears to have lumped this discussion, like that of the solar ponds, into the brief reference to Mr. Stone's discussion of "waste sites" and "previous burial practices."

12. Neither Mr. Stone, to my knowledge, nor I, was given an opportunity to review and correct the FBI report of the February 17, 1988 meeting. Had we been given that opportunity, I would have noted the above as corrections and additions, and I would also have noted that the author misspelled my name even though I had given him my business card.

13. Mr. Stone met with or had spoken to government agents respecting these matters on several other occasions, both before and in the months following the February 17, 1988 meeting.

Mr. Stone Provided Documents in March 1988

14. During Mr. Stone's discussions with the government agents before filing this action, Mr. Stone offered to provide the government with certain documents he had in his possession concerning the subjects they had discussed, an offer that Mr. Lipsky accepted.

15. In March 1988, Mr. Stone provided Mr. Lipsky with a set of documents that he had previously obtained during his employment at Rocky Flats that were hand-numbered in the lower right-hand corner. Mr. Stone had hand-numbered them in the lower right-hand corner, as a means of identification. Prior to the delivery of the documents to Mr. Lipsky, I reviewed with Mr. Stone a set of the hand-numbered documents to be provided to Mr. Lipsky. The document collection was hand-numbered from 1 to 1085.

16. In late March 1988, Mr. Stone provided a set of this document collection of about 1100 numbered pages to Mr. Lipsky. A duplicate set of these documents was maintained in my office. Based upon my review of this set of documents, I know that among the numbered documents produced to the government in March 1988 were the following:

Doc. No. 276 – an Engineering Order, dated October 13, 1982, containing Mr. Stone's review and comments on the designs for solar evaporative pond sludge removal, *i.e.*, "pondcrete;"

Doc. No. 4 – an Engineering Calculation Sheet, dated December 1, 1980, entitled "Nitrate Waste Irrigation," containing Mr. Stone's review and comments on the design for the nitrate waste irrigation system;

Doc. No. 410 – an internal memorandum to a Rockwell manager, dated March 20, 1984, describing Rockwell's ground water control system as a "latent time bomb;"

Doc. No. 790 – a listing of Functional Performance Areas (FPA's) for Rockwell with award fee grading area marked; and

Doc. No. 789 – an excerpt from a Rockwell internal letter concerning award fees which states that "DOE will not even consider an award fee if we do not perform at least at a satisfactory level in all 37 FPA's."

Copies of these documents are attached hereto as Exhibit C.

17. Further, in March 1988, Mr. Stone also provided the Government with a copy of his state court complaint, which I prepared. As the Court noted in its December 17, 2002 Order, Mr. Stone discussed spray irrigation in his state court complaint, and provided a copy of it to the Government in 1988. The state court complaint states, in relevant part:

> On December 1, 1980, plaintiff recorded an objection to pumping nitrate enriched wastewater from the east side of the RFP to the west side, for disposal by irrigation, in lieu of simply siphoning the wastewater to lower terraces on the east side. Plaintiff's concern was to reduce the migration of groundwater through contaminated soil on plant-site toward domestic water reservoirs, and to reduce cost. Defendant ignored the plaintiff's engineering report.

(App. 477, State Court Complaint at 6)

Filing of this Action Under Seal in July 1989

18. This was not the end of Mr. Stone's providing information to the Government. These subjects were again covered in his original complaint in this action and the Plaintiff's Confidential Disclosure Statement of Material Evidence and Information, personally served on Michael Norton, the U.S. Attorney for Colorado.

19. The original complaint was filed on or about July 5, 1989 under seal and remained under seal for many months before Rockwell or any member of the public could obtain a copy. In accordance with the False Claims Act, the Disclosure Statement was personally served on Michael Norton, the U.S. Attorney for Colorado, with a copy to the Attorney General. It is my understanding that the government continued its investigation throughout that

period. After the filing of this action, Mr. Stone also continued to meet with the Government.

20. As specified in the Disclosure Statement, it was served on the Government along with four boxes of documents. Copies of the documents listed above regarding pondcrete and spray irrigation were included in the set of four boxes accompanying Mr. Stone's confidential Disclosure Statement. As noted above, however, the documents numbered through 1085 and Mr. Stone's state court complaint were provided to the government over a year earlier.

21. Because the Disclosure Statement was confidential, Rockwell did not get a copy of the Disclosure Statement in 1989. It is my understanding Rockwell later obtained a copy during the discovery phase of this action.

22. In short, prior to the filing of this action, Mr. Stone provided the government with his information that pondcrete production was resulting in pondcrete blocks that would release hazardous wastes. Mr. Stone also told the government that Rockwell had refused to modify the process to remedy the problem. With respect to spray irrigation, Mr. Stone provided the government with his information that improper waste disposal, in the form of spray irrigation, was occurring at Rocky Flats. Mr. Stone answered all of the government's questions on these subjects.

23. I have no information that would lead me to believe that Mr. Stone withheld information from the government in his pre-filing meetings. To my knowledge, information and belief, all information reported to the government by Mr. Stone has been consistently and faithfully based on his direct and independent knowledge.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of December 2002, at Burbank, California.

/s/ Hartley David Alley
HARTLEY DAVID ALLEY

JANUARY 1, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE RICHARD P. MATSCH

UNITED STATES OF AMERICA AND
UNITED STATES OF AMERICA EX REL.
JAMES S. STONE,
PLAINTIFFS.

V.

ROCKWELL AUTOMATION, INC. AND
BOEING NORTH AMERICAN, INC.
DEFENDANTS.

CIVIL ACTION NO. 89-M-1154

ORDER DENYING MOTION FOR RECONSIDERATION AND TO SUPPLEMENT THE RECORD

On December 24, 2002, James S. Stone filed a Motion for Reconsideration and to Supplement the Record, seeking reconsideration of this court's Findings and Conclusions on Limited Remand, filed December 17, 2002. Tendered with the motion are a declaration of Hartley David Alley, with attachments, and an affidavit of James S. Stone. The stated justification for this effort to supplement the record is that at oral argument on November 25, 2002, the court rejected the defendants' submission of an affidavit of Mr. Thompson, expressing an opinion regarding the reliability of FBI 302 reports, and made a comment on the court's own experience with such reports. Counsel for the Relator contend that

because of this comment, "Mr. Stone understood that the court had rejected Rockwell's argument that any 'omissions' in the 302 reports constituted 'evidence' of any facts or inferences based upon such 'omissions.'" Because the court considered the lack of information regarding pondcrete in the reports of Agent Lipsky, counsel claims that rejection of the new affidavit and declaration would work a "manifest injustice."

A fair reading of the transcript demonstrates that the court did not mislead Mr. Stone or his counsel. The colloquy between the court and counsel for the defendants as well as that with counsel for the Relator during her rebuttal argument, make it clear that the court would consider the FBI 302 reports as a part of the agreed upon record to be used to make the findings required by the Tenth Circuit Court of Appeals. To now accept this declaration and affidavit would be inconsistent with what was stipulated to be the record to be used for the decision in this case and would require the court to accept, at face value, without an opportunity for cross-examination or otherwise test the credibility would obviously prejudice the defendants. To reopen the matter to include these additional statements would require that the defendants be given an opportunity to cross-examine the declarants and that would unduly prolong these proceedings.

In this court's view, it has considered the agreed upon record and made findings consistent with the agreements of counsel and the material in the record. It is therefore

ORDERED that the motion for reconsideration and to supplement the record is denied.

Dated: January 21, 2003

BY THE COURT:
/s/ Richard P. Matsch
Richard P. Matsch, Judge

April 5, 2006

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, *ex rel.* JAMES S. STONE, and UNITED STATES OF AMERICA, Plaintiffs-Appellees and Cross-Appellants, v. ROCKWELL INTERNATIONAL CORP., and BOEING NORTH AMERICAN, INC., Defendants-Appellants and Cross-Appellees.	NOS. 99-1351, 99-1352, & 99-1353

ORDER
GRANTING MOTION FOR AWARD OF ATTORNEYS' FEES

Before **BRISCOE, HOLLOWAY** and **HARTZ**, Circuit Judges

In these related appeals, all merits issues have been

determined. There remains pending the motion of plaintiff Stone for an award of attorneys' fees. As prevailing party in the main appeal by Rockwell, Stone is statutorily entitled to a fee award. We have previously noted that the fee provision in 31 U.S.C. § 3730(d)(1), which provides for recovery of fees by a successful *qui tam* relator, is phrased in mandatory language. *Shaw v. AAA Eng. & Drafting, Inc.*, 213 F.3d 538, 544 (10th Cir. 2000).

We therefore grant the motion and remand to the district court for a determination of a reasonable fee award. *See Hoyt v. Robson Cos.*, 11 F.3d 983, 985 (10th Cir. 1993).

Entered for the Court
Elisabeth A. Shumaker, Clerk of Court

By: /s/ Audrey F. Weigel
Deputy Clerk

Nos. 99-1351, 99-1352, & 99-1353, United States of America, *ex rel.* James S. Stone, et al. v. Rockwell International Corp., et al.

BRISCOE, J., dissenting:

I respectfully dissent. As I did not join the majority in its resolution of these cases on their merits, I likewise would not grant plaintiff Stone's motion for fees as a prevailing party.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA
ex rel. JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION and BOEING
NORTH AMERICAN, INC.

Defendants.

**AFFIDAVIT OF MARIA T. VULLO
IN SUPPORT OF MOTION
FOR ATTORNEYS' FEES AND EXPENSES**

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARIA T. VULLO, being sworn, states:

1. I am a member of Paul, Weiss, Rifkind, Wharton & Garrison, lead counsel in this case for the *qui tam* plaintiff, James S. Stone. I submit this affidavit in support of our motion for attorneys' fees and expenses in order to present a brief summary of the services rendered and expenses incurred by Paul, Weiss in connection with this case.

* * *

22. We also spent 19.68 attorney hours and 9.3 support hours on other projects that do not fall readily into the categories of court-related activities or discovery. Most of

the time here was spent on calls or meetings with DOJ regarding general strategy, and researching other potential legal issues that might be raised by either the government or Rockwell in the context of government intervention.

January 2, 1997-December 31, 1997

23. With the grant of government intervention in November 1996, a new phase of the litigation commenced. Rather than being asked to take a smaller role in the case, Paul, Weiss and DOJ worked together as full and equal co-counsel for the plaintiffs in the prosecution of this case, and we complemented each other in many respects. Not only did we continue to participate in all discovery matters, we often took the lead on researching, drafting and writing papers to be filed with the Court.

24. During 1997, we spent a total of 2,054.15 attorney hours and 1,062.7 support hours on a wide variety of discovery-related projects, with most of the projects done in conjunction with the attorneys from DOJ. First, we assisted in the preparation and taking of several depositions that were conducted in the first half of 1997. Second, we conducted numerous witness interviews throughout the year. Third, we spent time reviewing documents related to three separate document review trips in Colorado during three separate weeks in September and October 1997.

25. In addition to discovery, there were a large number of motions filed during 1997. First and foremost, starting in the beginning of this time period, Rockwell had embroiled the parties in a long process of appeal to the Tenth Circuit on this Court's decision to grant government intervention. The Tenth Circuit ultimately upheld this Court's decision. Around the same time, a number of other motions were being prepared. We assisted the DOJ attorneys with a motion for summary judgment based on collateral estoppel

principles and a motion to strike Rockwell's affirmative defenses. While DOJ took the lead on the summary judgment motion and the motion to strike, we took the lead in preparing, researching and responding to a number of discovery motions filed by Rockwell in April 1997 (various motions for protective orders) and in July 1997 (four motions to compel which the Court denied).

26. Additional briefing was submitted during this period with respect to the binding effect of the plea agreement, and we took an active role in preparing those documents. In addition, we continued to prepare the usual scheduling orders for the Court and attended the corresponding status conferences. By our count, at least four such conferences were held during 1997: in May, June, August and December. Finally, during the months of June, July and November of 1997, we continued to research the intricate issues raised by our anticipated Rule 6(e) motion to unseal the grand jury transcripts and we began to draft the necessary papers. With regard to all of these motions, court filings, hearings and status conferences, we spent a total of 1,783.5 attorney hours and 63.3 support hours during the year 1997.

27. During 1997, we also had both internal meetings and meetings with our co-counsel at the Department of Justice to discuss trial strategy, and in particular, to discuss the various roles and responsibilities to be undertaken by each of our two teams at trial. We spent about 157.4 attorney hours during this time period in assessing trial strategy and beginning to prepare for trial.

January 1, 1998-June 25, 1998

28. With about six months to go before the July 6, 1998 trial date, we worked hard to finish fact discovery, to start and finish "expert" discovery, to make any necessary

motions prior to trial, and to file the requisite pre-trial papers. As for fact and opinion discovery, we spent 2,409.5 attorney hours and 1,329.4 support hours, a sum reflecting the enormous number (approximately 85) of fact depositions taken during this time period and the large number of opinion witnesses designated by Rockwell to provide testimony on Rockwell's behalf.

29. As for opinion discovery, we worked with DOJ in a number of respects. First, we worked with DOJ in the preparation of Rule 26 disclosures from two accounting and damages witnesses retained for our damages case and from a possible rebuttal witness on waste solidification issues. More significantly, the Paul, Weiss team spent additional time dealing with the five opinion witnesses designated by Rockwell to testify about issues at other DOE facilities around the country and matters unrelated to Rocky Flats. We prepared and filed a motion *in limine* to exclude their proffered testimony, a motion which is described in greater detail below, and a motion which we won. We also prepared for and took the depositions of two other opinion witnesses hired by Rockwell—Adrian Brown and Joseph Tamburini—whom Rockwell never called at trial.

30. In addition to the considerable discovery activities, we took the lead on two critical motions that were made during this period: (1) the motion *in limine* to exclude Rockwell's "experts" on other facilities; and (2) the motion to release the grand jury transcripts. Both motions involved issues with ramifications during the trial of this case. Our work on these motions and related court activities entailed an expenditure of 1,498.4 attorney hours and 263.6 support hours. We filed our motion *in limine* to exclude the proffered testimony of Rockwell's hired witnesses on other facilities on May 31, 1998. On June 11, 1998, the Court heard our motion and agreed that the proffered testimony by these individuals was not relevant to the issues in this case.

31. The second motion—the petition to release grand jury transcripts pursuant to Rule 6(e)—was made by us alone as Mr. Stone's counsel and entailed an enormous commitment of time and resources largely due to the outpouring of opposition from Rockwell, Rockwell's criminal counsel, and a score of individual intervenors and their counsel. We filed an initial petition on January 15, 1998; responded thereafter to a barrage of papers filed by Rockwell and the intervenors; attended the hearing on the petition before this Court in February, 1998 (at which this Court granted the petition); defended the subsequent appeal to the Tenth Circuit by Rockwell and its bevy of intervenors; participated in a four-hour hearing before the Tenth Circuit on April 1, 1998; prepared a supplemental petition following the order of the Tenth Circuit; and attended the hearing on the supplemental petition before this Court on June 2, 1998.

32. During this same period, we prepared for trial, spending about 862.0 attorney hours and 367.1 support hours in trial preparation. We had a number of meetings both internally and with DOJ to discuss trial strategy. We attended the pre-trial conference before the Court on June 2, 1998. In addition, pursuant to Fed. R. Civ. P. 26 and the local rules, there were a number of pre-trial submissions to be made. Although trial did not go forward on July 6, 1998, we saved all of our work on trial preparation and continued to build upon our work into the next period.

June 26, 1998-November 2, 1998

33. Throughout this next period, we continued our intense preparations for trial and spent a number of hours assisting DOJ in addressing the discovery of some 900 boxes of DOE documents (the vast majority found to be irrelevant to this case) shortly before the July 6, 1998 trial date. We

spent about 481.2 attorney hours and 5.4 support hours on this project.

34. Our work on trial preparation during this time period involved four major projects, on which we spent about 1,170.4 attorney hours and 227.1 support hours. First, starting in July 1998, we resumed our work on the jury instructions, and completed extensive legal research on all of the issues raised by the False Claims Act instructions. Second, we spent time at the end of September and into October responding to issues raised by Rockwell's proposed jury instructions, including briefs on the subject of the relator's role at trial. Third, we prepared a number of evidence outlines for the subject matters and witnesses to be presented at trial. Fourth, we spent time in preparing the damages case for trial, some during this period and, to a larger extent, during the next period.

35. In addition to trial preparation, we spent 502.4 attorney hours and 30 support hours working on several motions. Most of these hours were spent on a series of court filings regarding contract interpretation which started with a motion for an injunction under the All Writs Act. We did the research and wrote a motion (filed on August 13, 1998) to compel the defendants to produce information it possessed relating to jury polling. We also wrote the response to defendants' request to use videotaped depositions at trial. We attended status conferences and hearings with the Court regularly throughout this time period.

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36. During these last four months before the commencement of trial, we were entirely consumed by trial preparation activities. During this period leading up to trial, our firm spent 1,967.3 attorney hours and 847 support hours

on a number of important projects. We worked closely with the Department of Justice attorneys on virtually every aspect of trial strategy. We continued to work on jury instructions and issues that Rockwell's counsel raised regarding jury instructions. We continued to update and revise our case and witness outlines. We did extensive work on preparing the damages case for trial.

37. We also worked on all of the pre-trial submissions that were due to be filed with the Court in January, 1999. We helped prepare the trial exhibit list (consisting of 3,000 trial exhibits), the witness list, and the final pre-trial order. Another significant project involved the review of defendants' trial exhibits (some 2,000 exhibits) for the purpose of designating evidentiary objections. We reviewed trial exhibits and prepared examination outlines for the witnesses we were to examine at trial. We also prepared for and attended the pre-trial conference on February 4, 1999 and the final pre-trial conference on February 19, 1999.

38. Several additional motions were filed during this period, on which 585.8 attorney hours and 8.1 support hours were spent. Throughout November and December, we worked on subsequent rounds of the motion for an injunction under the All Writs Act and for a ruling on contract interpretation. At the November 24, 1998 hearing, the Court asked for supplemental briefing on the issues. We assisted DOJ in preparing our supplemental brief and attended the hearing on December 29, 1998 on this matter. In mid-February, we made a motion *in limine* regarding other facilities—on issues which the Court agreed at the February 19, 1999 final pre-trial conference. We also helped prepare and finalize plaintiffs' response to Rockwell's motion *in limine* regarding missing logbooks which was filed on February 18, 1999.

39. Finally, during this time period, we took the lead in

dealing with eleven additional depositions that Rockwell was seeking to take. We prepared for and attended most of these depositions. We spent 95.3 attorney hours and 33 support hours on this project.